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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 435.

EMORY S. LAND, individually and as Chairman of the United States Maritime Commission, et al., *Petitioners*,

v.

WATERMAN STEAMSHIP CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT.

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SUBJECT INDEX.

Page

Questions Presented 1

Statutes Involved 2

Statement of the Case 7

Summary of Argument 13

Argument 17

I. The Agreements between respondent and the British Ministry, upon which petitioners have commenced renegotiation proceedings are not contracts with a "Department" within the meaning of the Renegotiation Act of 1942, as amended, but are contracts with a foreign government ... 17

(a) The provisions of the charters show they are not contracts with the Commission 18

(b) The Congress refused to amend the Renegotiation Act to cover contracts with foreign countries 22

(c) The petitioners have purportedly commenced renegotiation of respondent's charters with the British Government and have made determinations with respect thereto 25

(d) The nature of the determination and demand for submission of data is such that equity may intervene 30

II. The existence of an administrative procedure for the determination of excessive profits which may be realized under contracts with a "Department", does not deprive the courts of jurisdiction to restrain the unauthorized renegotiation of contracts between respondent and a foreign government 37

III. Failure to pursue an administrative remedy is not a valid ground for denial of the relief sought by respondent because no such remedy is available 45

Page

IV. The Tax Court procedure under the Renegotiation Act does not provide respondent with an adequate remedy at law, and none is otherwise available 52

V. A proceeding under the Declaratory Judgment Act is appropriate for the determination of the rights of the parties to a controversy even though another remedy is available 57

VI. Unless respondent is granted the relief sought, it will be subjected to multiplicity of actions, and exposed to the danger that sums of money which may be withheld from it by petitioners when covered into the Treasury, will be beyond reach of any suit at law 62

VII. This is not a suit against the United States 66

Conclusion 68

Appendix 69

TABLE OF CASES.

Aetna Life Insurance Co. v. Haworth, 300 U. S. 227..16, 57
Allen v. Regents, 304 U. S. 439 63
American Federation of Labor v. National Labor Relations Board, 308 U. S. 401..... 30
American Life Insurance Co. v. Stewart, 300 U. S. 203. 64
American School of Magnetic Healing v. McAnnulty, 187 U. S. 94 50
Anniston Manufacturing Co. v. Davis, 301 U. S. 337. 45
Blair v. Oesterlein, 275 U. S. 220 51
Bradley v. Richmond, 227 U. S. 477..... 45
Brillhart v. Excess Insurance Co. of America, 316 U. S. 491 60
California v. Latimer, 305 U. S. 255.....44, 66
Cary v. Curtis, 44 U. S. 236 22
Coffman v. Breeze, 323 U. S. 316..... 44
Colorado v. Toll, 268 U. S. 228..... 45
Columbia Broadcasting System, Inc. v. United States, 316 U. S. 407 18

Page

Davis v. Wakelee, 156 U. S. 680 15
Delno v. Market Street Railway Co., C. C. A. Cal. 1942, 124 F. (2d) 965 57
Endicott Johnson Corporation v. Perkins, 317 U. S. 501 53
Ex Parte Young, 209 U. S. 123 ..... 17, 40, 62
First National Bank v. Weld County, 264 U. S. 450 45
Garfield v. Goldsby, 211 U. S. 249 41
Gilchrist v. Interborough Company, 279 U. S. 159 42
Great Lakes Dredge and Dock Company v. Huffman, 319 U. S. 293 60
Heiner v. Diamond Alkali Co., 288 U. S. 502 51
Henkels v. Sutherland, 271 U. S. 298 65
Hooe v. United States, 218 U. S. 322 64
Hopkins v. Southern California Telephone Co., 275 U. S. 393 ..... 62, 65
In Re Fassett, 142 U. S. 479 ..... 15, 51
Interstate Commerce Commission v. Brimson, 154 U. S. 447 16
Isthmian Steamship Co. v. Land, et al., Civil Action No. 29546 36
Levers v. Anderson, No. 51, this term, decided November 5, 1945 45
Luckenbach Steamship Co., Inc., v. Land, et al., Civil Action No. 28540 ..... 29, 37
Lukens Steel Company v. Perkins, 70 App. D. C. 354, 310 U. S. 113 ..... 15, 50
Maryland Casualty Company v. Pacific Coal and Oil Co., 312 U. S. 270 60
Miles Laboratories v. Federal Trade Commission, 140 F. 2d 683 44
Mine Safety Appliances Company v. Forrestal, No. 71, this term, decided December 10, 1945 ..... 17, 42, 46, 66
Minnesota Ex Rel, Pearson v. Probate Court, 309 U. S. 270 45
Muschany et al. v. United States, 324 U.S. 49 ..... 24, 25
Myers v. Bethlehem Shipbuilding Corporation, 303 U. S. 41 ..... 13, 42, 43, 44
Natural Gas Pipeline Company v. Slattery, 302 U. S. 300 44
Newport News Shipbuilding and Drydock Company v. Schauffler, 303 U. S. 54 ..... 18, 44

Page

Noble v. Union River Logging R. Co., 147 U. S. 165.... 40
Panama Railroad Co. v. Johnson, 264 U. S. 375..... 22
Perkins v. Elg, 69 App. D. C. 175, 99 F. (2d) 408, Affirmed 307 U. S. 325 60
Petroleum v. Commission, 304 U. S. 209..... 44
Phelps v. United States, 274 U. S. 341..... 64
Philadelphia Company v. Stimson, 223 U. S. 605....50, 66
Power Commission v. Edison, 304 U. S. 375 44
Proctor and Gamble v. Coe, 68 App. D. C. 246, 96 F. (2d) 518 41
Raymond v. Chicago Union Traction Co., 207 U. S. 20. 62
Robertson v. Railroad Labor Board, 268 U. S. 619.... 22
Robinson, et al. v. Deal, et al., 145 F. (2d) 382..... 63
Rochester Telephone Corp. v. United States, 307 U. S. 125 .....14, 16, 41, 58
Shields v. Utah Idaho Central Railroad Company, 305 U. S. 177 32
Spector Motor Service Inc. v. McLaughlin, 323 U. S. 101 60
Stark, et al. v. Wickard, 321 U. S. 288.....14, 17, 48, 50, 66
Trust Company v. Schnader, 291 U. S. 24.....14, 35
Union Pacific Railroad Co. v. Board of County Commissioners of Weld County, 247 U. S. 282..... 62
United States v. Algoma Lumber Co., 305 U. S. 415, 18, 19, 21, 46
United States v. Atchison, T. & S. F. Railway Co., 234 U. S. 476 16
United States v. Goltra, 312 U. S. 203.....15, 64, 65
United States v. North American Transportation and Trading Co., 253 U. S. 330..... 64
United States v. U. S. Fidelity & Guaranty Co., 10 C. C. A. 1939, 106 F. (2d) 804..... 65
Utah Fuel Company v. National Bituminous Coal Commission, 306 U. S. 56 33
Waite v. Macy, 246 U. S. 606 .....50, 66
Williamsport Co. v. United States, 277 U. S. 551..... 51
Wilson v. Illinois Southern Railway Co., 263 U. S. 574. 62
Work v. Louisiana, 269 U. S. 250..... 45
Yakus v. United States, 321 U. S. 414.....15, 56

STATUTES CITED.

Page

Act of April 21, 1808, c. 48, Sec. 3, 2 Stat. 484 20
Act of March 3, 1911, 36 Stat. 1141 65
Declaratory Judgment Act, U. S. C. Title 28, Sec. 400, 48 Stat. 955 ..... 2, 57, 59, 72
Renegotiation Act of 1942, Sec. 403, U. S. C. Title 50, App., 56 Stat. 245 ..... 1, 2, 3, 4, 5, 30, 32, 63
Revenue Act of 1943, Sec. 701, Public Law No. 235, 78th Cong. (58 Stat. 78) 2, 3, 6, 7
Shipping Act, 1916, as amended, Sec. 9, U. S. C. Title 46, Sec. 808 ..... 2, 21, 71
Suits in Admiralty Act, U. S. C. Title 46, Sec. 745, 47 Stat. 420 65

OTHER AUTHORITIES CITED.

Administrative Order No. 64, U. S. Maritime Commission 9
Department of State Publication 2439, Commercial Policy Series 80, Dec. 1945 68
Executive Order No. 8802 20
General Order No. 30 of the War Shipping Administration 3
House Report No. 733, 78th Cong., 1st Session 23
House Report No. 871, 78th Cong., 1st Session 47, 53
House Report No. 2088, 78th Cong., 2nd Session 20
H. R. 3316, 78th Cong., 1st Session 23
Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission 3
Senate Hearings on H. R. 3687, 78th Congress, 1st Session (Committee on Finance of Senate) 48, 54, 55

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT.

QUESTIONS PRESENTED.

1. Whether agreements for the charter of vessels, entered into by the respondent steamship company with the British Ministry of War Transport, an agency of the British Government, are contracts with a "Department" within the meaning of Section 403 of the Renegotiation Act of 1942, as amended.

2. Whether the courts may enjoin petitioners, who, disregarding the provisions of such charters, have determined them to be contracts with the Maritime Commission, from further applying the provisions of the Renegotiation Act

to such agreements, and enter judgment declaring the rights of the parties to the controversy.

3. Whether the petitioners, acting without authority of law, may be enjoined to prevent a tort consisting of a trespass against respondent's rights and property, where respondent has no remedy at law.

4. Whether the existence of an administrative remedy for the determination of excessive profits realized under contracts with specified departments of the Government, deprives courts of equity of jurisdiction to enjoin the application of the provisions of the Renegotiation Act to respondent's contracts with a foreign government.

5. Whether the courts have jurisdiction to enter a declaratory judgment of the rights of the parties in a case of actual controversy involving no case of administrative discretion, and where no adequate or exclusive administrative remedy is provided by statute.

STATUTES INVOLVED.

The Renegotiation Act of 1942, and each amendment thereto, is set out in full in Appendix C, filed by petitioners. Reference to this document will be designated "Pamphlet" throughout this brief.

The relevant section of the Shipping Act, 1916, and the Declaratory Judgment Act are set forth in Appendix 2 and Appendix 3, respectively, pages 71 and 72, of this brief.

Because of the confused arrangement of the Renegotiation Act and amendments thereto appearing in the Pamphlet, there is presented here for the convenience of the Court, an outline of the material provisions of such Act. This statute originally enacted April 28, 1942, has several times been amended. The last amendment, so far as pertinent here, was by the Revenue Act of 1943, (58 Stat. 78) which was enacted subsequent to the purported commencement of renegotiation of the charter agreements between

the respondent and the British Ministry of War Transport. (Pamphlet p. 18)

1. The Renegotiation Act was made applicable *only* to contracts with certain Departments of the United States Government, defined as follows: (Pamphlet, p. 15)

> "The term 'Department' means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively."

The War Shipping Administration was added by the Revenue Act of 1943, supra. (Pamphlet, pp. 18, 19). Previously on February 12, 1943, General Order No. 30 of the War Shipping Administration was issued establishing the War Shipping Administration Price Adjustment Board for the renegotiation of war contracts with the War Shipping Administration. (8 F. R. 2043)

2. With respect to the Maritime Commission, the term "Secretary" is defined to mean the Chairman of such Commission. (Pamphlet p. 15) The terms "renegotiate" and "renegotiation" are defined to include "the re-fixing by the Secretary of the Department of the contract price." (Pamphlet p. 6).

3. The Act authorized the Secretary of each Department to delegate "in whole or in part" his "authority and discretion herein conferred" to such individuals and agencies in such Department as he may designate. (Pamphlet p. 5).

4. Petitioners commenced renegotiation of the charter parties between respondent and the British Ministry of War Transport and made the determinations hereinafter referred to, purportedly under Sec. 403 (c) (1) and (2) of the Renegotiation Act, which provide that: (Pamphlet, pp. 8 and 9)

"(e) (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion, may renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract.

"(2) Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract (i) by reductions in the contract price of the contract or subcontract, or by other revision in its terms; or (ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount of such excessive profits; or (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or (iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or (v) by any combination of these methods, as the Secretary deems desirable. The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. * * * All money recovered by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts."

5. The statute was expressly made applicable—(Pamphlet p. 17)

"to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain

a renegotiation or recapture clause, unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942: * * * " (Sec. 403(c)(6).

6. The Renegotiation Act prohibits the commencement of renegotiation of the contract price of any contract subject to such Act—(Pamphlet p. 12)

"more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, as determined by the Secretary, occurs." (Sec. 403 (c)(6).

7. It is specifically provided by Sec. 403(c)(i) (Pamphlet p. 13) that the provisions of Sec. 403 shall not apply to:

"(i)any contract by a Department with any other department, bureau, agency, or governmental corporation of the United States * * * or with any foreign government or any agency thereof;"

8. The petitioners have demanded of respondent that it furnish certain information, data and financial statements with respect to "the operation under Maritime Commission (British Ministry of War Transport) charter parties" of the vessels named in the complaint (R. 22) and specific voyage data "as to each vessel in the Red Sea operation" (R. 33), purportedly under the authority of Sec. 403(e) of the Renegotiation Act which reads as follows: (Pamphlet p. 4)

"(e) In addition to the powers conferred by existing law, the Secretary of each Department *shall have the right to demand of any contractor who holds contracts with respect to which the provisions of this section are applicable* in an aggregate amount in excess of $100,000, statements of actual costs of production and such other financial statements, at such times and in such form and detail, as such Secretary may require. Any person who willfully fails or refuses to furnish any statement required of him under this subsection, or who knowingly

furnishes any such statement containing information which is false or misleading in any material respect, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or imprisonment for not more than two years, or both. * * *" (Italics ours)

9. The only portion of the Act of February 25, 1944, which it will be necessary to consider in this case, is that which undertakes to provide for redetermination by the Tax Court of a determination by the Secretary as to the existence of excessive profits. These provisions are Sec. 403(e)(1), and Section 403(e)(2). (Pamphlet pp. 37-38.)

"(e)(1) * * * Upon such filing such court shall have *exclusive jurisdiction*, by order, *to finally determine the amount, if any, of such excessive profits* received or accrued by the contractor or subcontractor, *and such determination shall not be reviewed or redetermined by any court or agency.* The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court *to finally determine the amount, if any, of excessive profits* shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding *de novo*. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or Department available for that purpose, and in the case of any other witnesses, shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or

the deposition is taken. *The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c) (2).*

"(e)(2) Any contractor * * * aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, *as to the existence of excessive profits,* which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, *as to the existence of excessive profits,* which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. *Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1),* * * *" (Italics ours.)

STATEMENT OF THE CASE.

The Renegotiation Act of 1942 authorizes and directs the Chairman of the United States Maritime Commission (hereafter referred to as the Chairman) to renegotiate contracts entered into with the United States Maritime Commission (hereafter referred to as the Commission) when, in his opinion, the profits realized, or likely to be realized thereunder, may be excessive.

This suit is to prevent the petitioners, acting as individuals and not as officers of the Government, from committing a further trespass against the rights and property

of the respondent, by continuing renegotiation proceedings commenced by them, and further applying the provisions of the Renegotiation Act to charter agreements entered into between the respondent and the British Ministry of War Transport, an agency of the British Government (hereafter referred to as the British Ministry).

Respondent is engaged in the business of owning and operating American-flag steamships in the general trades, its vessels being operated without financial aid from the Government in any form. (R. 3)

On April 25, 1941, and several dates subsequent thereto, the respondent entered into charter parties with the British Ministry for the charter to it of certain vessels owned by respondent for the transportation "of lawful merchandise" (R. 13), in accordance with the terms and conditions set forth in the charter parties attached to the complaint. (R. 13)

The final payment of the agreed charter hire on each vessel was made to respondent on the respective dates specified in the complaint, the latest of which was November 28, 1941, approximately five months prior to the enactment of the Renegotiation Act (R. 5). Such payment was made by the Commission pursuant to an arrangement entered into between an agency of the United States and an agency of the British Government, to which respondent was not a party, and about which it was not consulted (R. 4, 30). Under said arrangement it was agreed that the Commission "will make the following payments *required to be made to the owners*, or chartered owners, *by the British Ministry of War Transport* under the terms of the charter." (R. 20) (Italics ours). Respondent completed its obligations to the British Ministry under the terms of each of the charters, and said charters were terminated on the respective dates specified in the complaint, the latest of which was January 26, 1942, more than one whole fiscal year prior to the purported commencement of renegotiation of said charters by the Board. (R. 5) The fiscal year of the

respondent in 1942 and for many years prior thereto ended on September 30. (R. 3)

Administrative Order No. 64 of the Commission, established the Price Adjustment Board of the Maritime Commission, (hereinafter referred to as the Board). There was delegated to the Board by the Chairman the—

> "responsibility for bringing about such review of contract * * * prices as it may deem to be desirable, *renegotiating, or causing to be renegotiated*, such contract prices when, in its judgment, such action is necessary or desirable, and making such recommendations to the Commission as may be appropriate to effectuate the results of such renegotiations." (R. 11)

Furthermore, the Board

> "* * * in cases where it appears that costs or profits of contractors * * * are, or may be excessive for any reason, shall *initiate and be responsible for suitable action with a view to securing* adjustments and *refunds.*" (R. 12) (Italics ours)

On November 26, 1943, petitioners, purporting to act pursuant to the provisions of the Renegotiation Act and the Joint Statement by the War, Navy, and Treasury Departments and the Maritime Commission, promulgating the Purposes, Principles and Policies and Interpretations of such agencies under said Act (R. 24) served upon the respondent by registered mail "Notice of Initial Conference Under the Renegotiation Act Which Shall Constitute Commencement of Renegotiation." (R. 21) The respondent was directed to appear before the Board on December 13, 1943 for an initial conference and to furnish said Board with certain statements, information and financial data with particular reference to "the operation under Maritime Commission (British Ministry of War Transport) charter parties" of the vessels named in the complaint, (R. 22) said data to be used in determining *whether* respondent had realized excessive profits from its charter agreements with the British Ministry. (R. 23)

Such notice also informed respondent that—

> "You are at liberty at the initial conference * * * to state reasons why you are not subject to renegotiation." (R. 23)

On December 13, 1943, respondent, by letter of its Assistant Vice President, delivered on that date, denied the authority of the petitioners to require the renegotiation of, or their authority to renegotiate its charter parties with the British Ministry, and denied that such charter parties were contracts with a "Department" as defined in the Renegotiation Act. (R. 5, 29) In addition, respondent asserted that final payment of the charter hire had been made prior to the enactment of the Renegotiation Act; that the charters were completed in a fiscal year ending more than one year prior to the purported commencement of renegotiation, and that the payments to the respondent for the account of the British Ministry of War Transport were made pursuant to an arrangement strictly between the Commission and the British Ministry to which respondent was not a party and concerning which it was not consulted. (R. 4, 29)

Thereafter on May 23, 1944, petitioners notified respondent that: (R. 6, 31)

> "After considerable study of the entire Red Sea operation, I am satisfied that there was in each case a contract between the vessel owner and the Maritime Commission to which the Renegotiation Act is applicable."

It was further stated in said notice of the Board that it—

> "would not ask the vessel owners to go to the trouble of furnishing any financial data until I was satisfied that there was a renegotiable agreement with the Commission."

The rejection of respondent's claim that its charters with the British Ministry were not subject to the Renegotiation Act, and the determination that such charters were in fact contracts with the Commission, assertedly is based upon the fact that the vessels were made available under charter parties signed by the British Ministry and that the arrangement between the United States Government and the British Government, whereby the Commission was to pay the charter hire required to be paid by the British Ministry, was evidenced by correspondence with the vessel owner. (R. 32)[1]

The notice further stated (R. 32):

> "In view of the foregoing I suggest a conference at this office, 1200 15th Street, Washington, D. C. * * * at 10:00 A. M. on June 29 with Waterman Steamship Company *for the purpose of determining what portion of the profits of these companies is excessive within the meaning of the Act.*" (Italics ours.)

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[1] Obvious reference is to two letters addressed to respondent under the dates of May 31 and June 7, 1941, respectively. In the first letter it is stated:

> "The payment of the amounts due under the charter will be made as promptly as possible by the U. S. Maritime Commission from Lease-Lend funds. We are now endeavoring to perfect our procedure under the Lease-Lend Act, so as to insure prompt payment."

In the letter of June 7, 1941, the Commission advised the respondent that "practically all the details have been settled" and that "In securing reimbursement for the charter hire on these vessels we wish you to observe the following instructions:

> "1. Freight Bill. Upon vessel's sailing prepare a bill for freight earned by the vessel segregated to show the cubic capacity of the vessel under-deck, pursuant to the amount and at the rates shown in the charter and the cubic space occupied by on-deck cargo at the charter rate. *This bill should be certified by an authorized representative of the British Ministry of War Transport in New York.*" (Italics ours.)

There followed certain other instructions regarding the submission of copies of the executed charter, certificate approved by the agent of the charterer with respect to on-deck cargo, and preparation and submission of public voucher.

The notice demanded that respondent submit statements, information and financial data in accordance with a proposed outline attached thereto. This consisted of a document entitled "Statement in Renegotiation" in the *form of an affidavit* in which the officer of respondent executing the same *would make oath*, among other things as follows:

> "(1) that I am an officer to wit..... of....., *the Contractor* signing Exhibits A and B hereto attached;
>
> "(2) that I am duly authorized to execute this statement on behalf of *said Contractor;*"
>
> • • • • •
>
> "(4) that I have reviewed and verified the general information, financial data and specific voyage data as to each vessel in the Red Sea operation hereto attached as Exhibit A." (Italics ours.) (R. 33)

Exhibits A and B referred to therein consist of certain general information and financial data regarding the respondent corporation, and voyage data in detail with respect to each of the vessels chartered by respondent to the British Ministry under the so-called Red Sea Charters. (R. 34)

On June 27, 1944, respondent filed its complaint herein (R. 1 et seq.) alleging the foregoing facts, and seeking (1) an injunction against further trespass upon respondent's rights and property and threatened irreparable injury which would result from carrying out the unlawful determinations and demands theretofore made by petitioners, and (2) a declaratory judgment that the charters in controversy are not subject to the provisions of the Renegotiation Act.

On June 28, 1944, respondent filed its motion for a preliminary injunction (R. 35). On July 10, 1944, petitioners filed their Motion to Dismiss (R. 37) upon the grounds that (a) the Court lacks jurisdiction over the subject matter of the action, and (b) that petitioner had failed to show any

injury, irreparable or otherwise, and had failed to exhaust its administrative remedies.

The District Court denied respondent's motion for preliminary injunction and dismissed the complaint on the authority of *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41 (R. 38). On appeal, the Court below reversed and remanded the case to the District Court for consideration of the single question "Were the charter agreements, entered into in 1941 by Waterman Steamship Corporation and the British Ministry of War Transport, contracts with a 'Department' within the meaning of Section 403 of the Renegotiation Act of 1942?" (R. 52)

Certiorari was granted November 5, 1945. (R. 56)

SUMMARY OF ARGUMENT.

I.

The charter parties between respondent and the British Ministry are not contracts with the Maritime Commission. The Congress, although requested to do so, refused to amend the Renegotiation Act to subject contracts with foreign countries to its provisions. Therefore, the Renegotiation Act confers upon petitioners no authority to renegotiate contracts with a foreign government. The charter hire required to be paid by the British Ministry under the charters, was paid by the Commission pursuant to an arrangement between the United States Government and the British Government, which arrangement is not subject to the provisions of the Renegotiation Act. The determinations of petitioners that the charter parties in controversy are contracts with the Commission, and that excessive profits have been realized, and their demand for the submission of statements, information, and financial data, for the purpose of determining the amount of alleged excessive profits, are an invasion of respondent's legal rights, and unless the relief sought is granted, will result in depriving respondent of its property without due process of law.

II.

The existence of an administrative remedy for the determination of the amount, if any, of excessive profits realized under contracts with a "Department," as defined in the Renegotiation Act, (the purpose for which it was established by the Congress) does not deprive a court of equity of jurisdiction to enjoin the unlawful application of the provisions of such Act to respondent's charter parties with a foreign government, where claim to exemption from the provisions of the Act has been definitely rejected by petitioners and a determination made by them that such charters are agreements with the Commission, and are subject to the provisions of the Act. *Trust Company* v. *Schnader,* 291 U. S. 24; *Stark, et al.* v. *Wickard,* 321 U. S. 288. The fact that the administrative body *may,* upon consideration, determine that no excessive profits were realized, is immaterial. Respondent is entitled to come into Court in this case, not to review action within the discretionary authority of the petitioners to render a favorable, rather than an adverse decision, but because of erroneous determinations of law completely outside petitioner's authority. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 134.

III.

The Renegotiation Act does not authorize the renegotiation of contracts with foreign governments, and no administrative remedy is provided to meet the grievances alleged in the complaint, and none is otherwise available. The Act does not contemplate unlawful conduct beyond its terms and entirely outside the scope of its authority. The procedure prescribed in the Renegotiation Act could not possibly be used to challenge the authority of petitioners to make the determinations and demands which they have made. Moreover, respondent is not required to pursue such administrative remedy, because the statute upon its face shows that it is incapable of affording judicial protec-

tion against the arbitrary, or illegal acts of petitioners in asserting jurisdiction to renegotiate respondent's contracts with the British Ministry, and their statutory authority to make the determinations already made. *Yakus* v. *United States*, 321 U. S. 414. If the administrative procedure provided in the Renegotiation Act were availed of by respondent, its use would admit the illegality of the protested determinations and other acts of petitioners, and leave respondent at the mercy of petitioners in carrying out their unlawful purpose. *Lukens Steel Company* v. *Perkins*, 70 App. D. C. 354, (reversed on other grounds—310 U. S. 113); *In Re Fassett*, 142 U. S. 479.

IV.

Respondent is entitled to the relief sought because it has no remedy at law which is plain, adequate, certain, effective and complete under the Tax Court procedure, or otherwise. In the most favorable aspect of petitioners' contentions, whether respondent could ever obtain relief at law, even against some party other than petitioners, is a matter of sheer speculation. If the petitioners, pursuing the course already plotted by them, withhold monies due respondent on its contracts with the United States, the statute immediately places it beyond the reach of respondent. (Pamphlet, p. 9). Thus, respondent's property having been taken without authorization of Congress, there is no plain and certain right of its recovery. *United States* v. *Goltra*, 312 U. S. 203.

It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will afford relief. Where equity can give relief, respondent is not to be compelled to speculate upon the chance of obtaining relief at law. *Davis* v. *Wakelee*, 156 U. S. 680.

V.

A declaratory judgment is an appropriate remedy where it will clarify and settle legal relations in issue and where it will terminate and afford relief from uncertainty and

controversy. It is a remedy which may be granted without regard to the existence of a remedy elsewhere, and even in the absence of an allegation that "irreparable injury is threatened." *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227.

Respondent's legal and constitutional rights have been and are affected and brought into question by the conduct and threatened conduct of petitioners. The question of legality of the action of petitioners in determining to apply, and in applying the Renegotiation Act to the charter agreements entered into between the respondent and the British Government has arisen between the parties hereto; namely, whether the Renegotiation Act confers upon petitioners authority to apply its provisions to said charter parties and to make the determinations heretofore made and to take further threatened action thereunder. This question is fundamental to all activity of the petitioners, with respect to the renegotiation of such charter agreements.

Where the petitioners have denied claim for an exemption from the terms of the Renegotiation Act, of contracts between respondent and the British Ministry, in complete disregard of their provisions as is the case here, (*United States* v. *Atchison T. & S. F. Railway Company*, 234 U. S. 476), and since petitioners' determination that respondent's charter parties are contracts with the Commission subjects respondent to a statutory command, compelling it to comply with the demands of petitioners, there is a constitutional case or controversy. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; *Rochester Telephone Corp.* v. *United States*, *supra*.

VI.

Respondent is entitled to the relief sought on the ground that it would be subjected to a multiplicity of actions, either as plaintiff or defendant, even if a legal remedy were available to it. Furthermore, respondent would not only lose the use of money to which it is legally entitled, but if re-

covery could be had at all, it would lose interest thereon during at least a portion of the time necessary for recovery.

VII

While petitioners have not heretofore raised the issue that this is an action against the United States, the principle decided in *Mine Safety Appliances Company* v. *Forrestal,* (No. 71, this term) decided December 10. 1945, has no application here. To prevent petitioners from doing what they have no legal right to do, is not an interference with the performance of a function of government entrusted to them by statute. *Ex Parte Young,* 209 U. S. 123; *Stark, et al.* v. *Wickard, supra.*

ARGUMENT.

I.

The Agreements Between Respondent and the British Ministry, upon which Petitioners have Commenced Renegotiation Proceedings are not Contracts with a "Department" within the Meaning of the Renegotiation Act of 1942, as Amended, but are Contracts with a Foreign Government.

This case turns on the question of whether the Congress has subjected to the provisions of the Renegotiation Act, charter parties entered into between respondent and the British Ministry upon which petitioners purportedly have commenced renegotiation proceedings. Respondent maintains (1) that the power of petitioners is circumscribed by the authority prescribed in the Renegotiation Act; that because the Congress has passed no law with respect to the renegotiation of contracts with a foreign government, the petitioners were and are acting outside their authorized administrative power in dealing with government contracts; and (2) a court of equity is the only forum where respondent can secure protection against the arbitrary acts and determinations of petitioners entirely beyond the scope of

their delegated powers, which interfere with the legal rights of respondent, and threaten to deprive it of its property without due process of law. Petitioners contend that the existence of an administrative remedy with respect to contracts within the scope of the Renegotiation Act deprives a court of equity of jurisdiction to prevent the enforcement of determinations and demands already made and the further application of the provisions of the Renegotiation Act to respondent's charter parties with the British Ministry.

Whether the Congress has subjected the charter parties in controversy to the provisions of the Renegotiation Act is a question of law and can be decided only by the courts.[2]

For the purpose of determining this question, the allegations of the complaint must be accepted as true.[3] The case was submitted on a verified complaint and motion to dismiss.

(a) The Provisions of the Charters Show They Are Not Contracts With the Commission.

This Court has said that in any case[4]

> "of a written contract, those who are parties to and bound by it are to be ascertained *by an inspection of the document, and its provisions are controlling* in the absence of some positive rule of law or provision of statute requiring them to be disregarded." (Italics ours.)

The charter parties have been set out in the complaint. (R. 13) They were for the hire of the vessels of respondent only for outward voyages to the Red Sea area. Each such agreement provides that, (R. 13):

> "It is this day mutually agreed between *Waterman Steamship Corporation* Owners of the Steamship.....

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[2] *Newport News Shipbuilding and Drydock Company* v. *Schauffler*, 303 U. S. 54, 57.

[3] *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407, 414.

[4] *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 421.

.....of..... tons net register, classed First Class American Bureau of Shipping now trading and *British Ministry of War Transport* Charterers, as follows:" (Italics ours).

The charters were signed in the names of the respondent, by its proper officials, and by the representative in the United States of the British Ministry. That this constituted a contract between respondent and the British Government, is conceded by petitioners by the motion to dismiss and in their brief. They assert no rule of law or provision of statute which entitles them or the Court to disregard the clear provisions of the charter agreements in determining the parties thereto. To place the charter parties outside the principle enunciated in the *Algoma case, supra,* petitioners rely solely upon argument, that "the Board's counsel" who "could not speak for the Board" and who "plainly expressed his opinion only, not that of the Board or the Chairman" (Petitioners' brief, p. 17) that "there was in each case (pertaining to the Red Sea operation) a contract between the vessel owner and the Maritime Commission to which the Renegotiation Act is applicable." (Petitioners' brief, p. 8)

It is this determination by petitioners, set out in the notice to respondent, dated May 23, 1944, about which complaint is made. (R. 6) That determination is not supported by any facts, or even by any claim of the existence of any facts. Its sole support is found in the statement in such notice that the Commission had, by correspondence, evidenced to the vessel owner the arrangement between the United States and the British Government, by which it was agreed that the payments of charter hire "required to be made to the owners or chartered owners by the British Ministry of War Transport under the terms of the charter:", (R. 20) would be made by the Maritime Commission. (See footnote 1, page 11.)

No claim has been made by petitioners, either in the record or in their briefs that as between the Commission

and the respondent, the Commission at any time succeeded to any of the benefits running exclusively to the British Ministry.[5] It is merely asserted that the respondent was notified by the Commission, that pursuant to an arrangement betwen the governments of the United States and Great Britain, it, the Commission, would pay the charter hire "required to be paid by the British Ministry."[6]

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[5] Conclusive evidence that the Commission at no time thought that any arrangement with respondent in connection with the Red Sea charters could be regarded as a contract with a Department, is to be found in the absence of certain provisions which all United States government contracts are required by law or Executive Order to contain.

The Act of April 21, 1808, c. 48, Sec. 3 (2 Stat. 484), as amended, U.S.C. Title 41, Sec. 22, provides that there shall be inserted in every contract entered into on behalf of the United States an express provision that no member of or delegate to Congress shall be admitted to any share or part of such contract or to any benefit to arise thereupon.

Executive Order No. 8802, dated June 25, 1941 (6 F. R. 3109) provides in part that all contracting agencies shall "include in all defense contracts hereafter negotiated by them a provision obligating the contractor not to discriminate against any worker because of race, creed, color or national origin."

[6] Reference is made in footnote 3, page 4, of petitioners' brief to the hearings conducted by a subcommittee of the Committee on Merchant Marine and Fisheries, House of Representatives, into the so-called Red Sea charters, and the report of said Committee. Petitioners' summary of the report fails to include pertinent facts outlined by the subcommittee (House Report No. 2088, 78th Cong., 2d Sess.) The report states: (p. 3)

> "The representatives of the Commission * * * proposed a rate of 75 cents net per cubic foot on the under-deck bale cargo capacity and 60 cents net per cubic foot for such cargo as was carried on deck. * * * All income from the carriage of commercial cargo on the outward voyages to the Red Sea was to be *for the account of the charterer,* * * *. Apparently *these rates and terms were fixed by the representatives of the Commission rather than by negotiation or bargaining.* * * * ". (Italics ours)

And further (p. 6):

> "As previously stated, the going commercial rates to the Red Sea at that time approximated $1 per cubic foot of cargo

All that was done by officials of the Commission in this case "in supervising the execution of the contracts and their performance, was consistent with the exercise of its function" in approving charters of American-flag vessels to aliens, under Section 9 of the Shipping Act, 1916 "without the assumption by the United States of any obligation to the" owners of the vessels "and no implied obligation on its part arises from the performance of that function." *United States* v. *Algoma Lumber Co., supra,* p. 422.

As was well stated by the Court below (R. 47)

> "Giving effect to all that is contained in this correspondence between a bureau of the United States and the British Shipping Mission, it shows no more than an understanding between the two governments that the United States would defray the expenses of the delivery from this country to ports on the Red Sea of war supplies to the British."

This understanding between the two governments which, so far as respondent is concerned, was "evidenced by cor-

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space (172), and this was the approximate figure paid on the 6,000,000 cubic feet of commercial cargo which was carried in the course of these voyages (202)."

Thus, the rate of charter hire fixed by the Commission was 25 percent lower than existing commercial cargo rates for the transportation of commercial cargo to Red Sea ports. The rate charged by the British Ministry for the transportation of the 6,000,000 cubic feet of commercial cargo which the Charter parties authorized, was 33⅓ percent in excess of what it was obligated under the charters to pay the American owners of the chartered vessels.

The Report continues: (p. 3)

> "The position of the Maritime Commission in obtaining these vessels was somewhat anomalous in that it was not to be one of the parties to the charters, was *not* to pay the costs of the voyages from its own funds, and yet was to establish and approve the rates as well as the provisions of the charters (10). The charters were to be made between the owners and operators of the vessels and the British Ministry of War Transport while payment of the charter hire was to be from lend-lease funds allocated for this purpose (10)." (Italics ours)

respondence between the Commission and the vessel owner" could have no possible effect

> "upon Waterman's legal rights in the charters, and this is especially true in the light of the allegation of the complaint that as to the arrangement Waterman was not consulted and took no part in its consummation." (R. 47)

(b) The Congress Refused to Amend the Renegotiation Act to Cover Contracts with Foreign Countries.

In enacting the Renegotiation Act, or amending it, the Congress might have provided any number of tests of whether a given contract would be subject to renegotiation, and delegated to the Secretary of each Department the authority to apply such tests and make a determination as to what contracts are to be renegotiated. But the Congress did not do so. It made its own determination as to the contracts to which the provisions of the Renegotiation Act should be applied. In the original Renegotiation Act, and through four successive amendments thereof, the Congress determined that *only* the contracts *with a Department*, as that term is defined in the Act, shall be subject to the provisions of such Act. It must be presumed that the Congress was cognizant of the rule of law previously announced by this Court that the express provisions of contracts are controlling as to who are parties thereto. *Cary* v. *Curtis*, 44 U. S. 236. The failure of Congress to enact any statutory modification of this firmly established principle, although requested to do so, must be taken as conclusive that none was intended. *Robertson* v. *Railroad Labor Board*, 268 U. S. 619; *Panama Railroad Co.* v. *Johnson*, 264 U. S. 375.

Before the renegotiation proceedings had been initiated by the petitioners with reference to the British Government contracts involved in this case, it was recommended by the Committee on Naval Affairs of the House of Representatives that contracts of American firms with the Allied governments, the financial obligations under which had been

assumed by the United States, pursuant to arrangements between such governments and the United States, acting in accordance with the Lend-Lease program, should be subjected to renegotiation.[7]

To carry out this recommendation, the Chairman of such Committee introduced a bill in the House of Representatives, September 22, 1943, which was referred to the Committee on Ways and Means.[8]

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[7] House Report No. 733, 78th Congress, 1st Session, states: (Pp. 24, 25, 26)

> "Renegotiation, it will be recalled, is not applicable to all Government procurement. Only those contracts may be renegotiated which have been awarded by the War, Navy, and Treasury Departments, the Maritime Commission, the War Shipping Administration, Defense Plant Corporation, Defense Supplies Corporation, Rubber Reserve Company, and Metals Reserve Company. • • •
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> • • • • • • • • •
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> "There are still vast areas of procurement, however, which lie outside renegotiation. • • •
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> • • • • • • • • •
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> "During the course of the investigations made by the Committee, our attention was also directed to a group of lend-lease contracts which appear to lie at the present time outside of the scope of renegotiation. *Prior to our entry into the war, the British and other Allied Governments in 1940 and 1941 placed large orders with many American firms for war materiel.* These contracts were subject to the same uncertainties of cost that have characterized the war contracts entered into by the War and Navy Departments. • • • *We think that the law should be amended so as to subject this group of contracts to renegotiation.*" (Italics ours.)

[8] H. R. 3316, 78th Congress, 1st Session. Section 11 provided for the amendment of Section 403 (k) of the Renegotiation Act to read in pertinent part, as follows:

> "(k) All the provisions of this section shall be construed to apply to Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, Rubber Reserve Company, the Department of Agriculture, the War Shipping Administration, and to contracts with any foreign government, or any agency thereof, described in section 403 (i) (1) (i) hereof. • • • "

Although the Ways and Means Committee subsequent to the Report referred to above, recommended a great number of amendments to the Renegotiation Act, which (with modification) were enacted by the Congress on February 24, 1944, the recommendations of the Naval Affairs Committee were not enacted into law. The statute, as so amended, retained in effect the basic requirement that a contract be one *with a department* before the Renegotiation Act could lawfully be applied to it. By failing to extend the Renegotiation Act to British Government contracts financed by the United States through advancements under the Lend-Lease program, although it was requested so to do, Congress clearly indicated its intention that the Act should not apply to such contracts.

The fact that the Renegotiation Act has a restricted and limited field of applicability has recently been recognized by this Court in *Muschany et al.* v. *United States*, 324 U. S. 49.

In that case, the government sought to repudiate option contracts which had been entered into by the War Department for the purchase of land to be used as the site for an ordnance plant. Among the grounds urged by the government for such repudiation was the fact that the contracts resulted in a very high profit to the owners of the land.[9]

The amendment of Section 403 (i) (1) (i) (Section 10 of the Bill) provided for renegotiation of contracts with any foreign government or agency thereof where any department or any other agency of the United States acquires the interest of any foreign government in a contract entered into by such foreign government with a contractor doing business in the United States. Such provisions would not even include the Red Sea Charters. No department or agency of the United States ever acquired the interest of the British Government in such charters.

[9] The contract in one case provided for the payment by the government of $4,500 for certain land which had been acquired by the owners in 1939 for $1,000. In the other case, the government agreed in 1940 to pay $12,000 for land which petitioners had acquired in 1934 for $2,250.

The Court sustained the validity of both contracts, and with respect to whether the Renegotiation Act established an all-pervading policy against high profits, or only a curb upon such profits under specific contracts, the court said (p. 58):

> "* * * Congress' adoption of statutes providing for the renegotiation of war contracts indicates that *in certain instances* the government seeks to recover abnormally high contract profits. That Congress could have extended the coverage of these provisions to these contracts is unquestioned; the fact that it did not do so *cannot be disregarded* by this Court." (Italics ours.)

In the case at bar, the contracts were entered into with a foreign government, and the Congress, having been advised by one of its Committees that they were not subject to the provisions of the Renegotiation Act, refused to make them so. This fact would seem to require the same conclusion reached by the court in the *Muschany* case, *supra*, that (See footnote 8, page 59)

> "Legislation in regard to the renegotiation of war contracts is not applicable to either of the contracts involved in this case."

(c) The Petitioners Have Purportedly Commenced Renegotiation of Respondent's Charters With the British Government and Have Made Determinations With Respect Thereto.

Counsel for petitioners undertake to argue that on the basis of the record there exists nothing more than a disagreement between counsel for respondent and counsel for the Board "as to whether certain contracts are subject to the Renegotiation Act." This is an inaccurate statement of the record, and the argument, based upon such error, must be disregarded. The allegations of the complaint, which must be taken as admitted, show that under date of November 26, 1943, by registered mail, there was sent respondent a "Notice of initial conference under the Renegotiation Act

which shall constitute commencement of renegotiation," and fixing a time on December 13, 1943 for an initial conference with the Board.[10]

The Board, in said notice, demanded of the respondent that it submit certain information regarding terminated voyage revenue and expense and other income and expense "showing separately the operation under Maritime Commission (British Ministry of War Transport) charter parties" of respondent's vessels named in the complaint. Respondent was also asked to submit a "detailed breakdown of overhead in said period * * * showing separately that part which in your opinion should be allocated to the operation under Maritime Commission (British Ministry of War Transport) Charter Parties" covering the same vessels. A mass of other financial and related data was demanded of respondent for the calendar years 1941 and 1942 (R. 22, 23).

The respondent on December 13, 1943, the date set for the initial conference appeared, and filed a letter with the Board, signed by its Assistant Vice President, (R. 29) denying the authority of the Board or the Chairman to renegotiate the charter agreements for the reason that they were entered into with the British Government and were not contracts with the Commission. Respondent also asserted that the payments to it were made for the account of the

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[10] This was more than one full year after the close of the fiscal year of the respondent within which the charter parties were completed and terminated. The Chairman has determined with respect to contracts with the Commission that the term "completion of the contract" means—

> "final delivery or acceptance under the contract, rather than final payment, and the fact that a contractor may still have certain obligations under guarantees of performance or the fact that there may be unliquidated items outstanding does not extend the time of completion beyond the date of final delivery or acceptance." (R. 28)

If the charters in controversy had been contracts with the Commission, they would be exempted by this determination of the Chairman, made pursuant to Sec. 403 (e) (6). (Pamphlet, p. 12)

British Ministry, pursuant to an arrangement strictly between the Commission and the British Ministry, to which respondent was not a party and concerning which it was not consulted. (R. 29) Respondent refused to furnish the information and financial data demanded by the Board in such notice. By letter, dated May 23, 1944, on the letterhead of the Commission, signed "Kenneth F. Clark, Price Adjustment Board," respondent was advised that its claim that the charter parties are not subject to the provisions of the Renegotiation Act, had been definitely rejected and that a determination had been made that "there was in each case a contract between the vessel owner and the Maritime Commission to which the Renegotiation Act is applicable." (R. 31) A time was fixed for a conference "for the purpose of determining *what portion of the profits* of these companies *is excessive within the meaning of the Act.*" (R. 32) (Italics ours.)

Again, a demand was made for the submission of information and financial data in accordance with the proposed outline enclosed with the letter. These forms call for the execution of a "Statement in Renegotiation," to which would be attached several exhibits containing general information and detailed data with respect to each vessel operated under the Red Sea charters. (R. 33, 34) Thus, the statement in petitioners' brief at page 17 that nothing in the letter altered the invitation in the original notice to state reasons why you are not subject to renegotiation, is clearly erroneous.

Respondent alleges in the complaint that, by letter dated May 23, 1944, "the defendants replied and advised the plaintiff that * * * it had been determined there was in each case a contract between the vessel owner, the plaintiff, and the Maritime Commission to which the Renegotiation Act is applicable," (R. 6). The letter is set out in full as Exhibit I to the compaint, (R. 31, 32). The truth of this allegation is admitted by the motion to dismiss. Counsel for petitioners may not by argument be heard to say that this letter

merely expressed the opinion of the Board's counsel, and not that of the Board or the Chairman. It is further asserted by petitioners that in any event, the Board's counsel could not speak for the Board, and the Board has not determined that these contracts are subject to the Act.

This merely begs the question. The respondent is not required under any rule of law to conduct an investigation for the purpose of determining the location of the boundary lines which mark the limits of the authority of the respective members of the Board and its staff.

The fact is that the letter constituted an official notification that respondent's charter agreements with the British Government had been determined to be contracts with the Commission and subject to the provisions of the Renegotiation Act, and that excessive profits had been realized therefrom. The notice fixed a time and place for a conference to be held, not for the personal enlightenment of an unauthorized member of the Board's staff, but for the serious purpose, as stated in the notice, "of determining what portion of the profits" is excessive within the meaning of the Act. (R. 32) Moreover, the notice came from a Board, to which had been delegated the authority and responsibility of "renegotiating, or causing to be renegotiated," contracts with the Maritime Commission and to "initiate and be responsible for suitable action with a view to securing adjustments and refunds." (R. 11, 12).

Petitioners' argument is contradicted by their own records with respect to demands upon other steamship companies which entered into charter parties with the British government under the same circumstances as those in controversy here. For illustration, on December 8, 1944, Mr. Clark, who was at that time a member of the Board, notified another company that:

> "* * *We may reach a point very soon where we will have to enter unilateral orders determining excessive profits * * *."

And again on December 16, 1944, Mr. Clark notified the company:

> "This Board, however, will not hesitate to issue a unilateral determination because renegotiation must be concluded either by agreement or by unilateral determination." [11]

It will be noted that Mr. Clark, speaking for the Board, did not say that "I will recommend to the Board which, in turn, will recommend to the Chairman" that certain determinations be made. He was emphatic in stating that the Board would enter unilateral orders or a unilateral determination.

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[11] There is pending in the District Court of the United States for the District of Columbia the case of Luckenbach Steamship Company, Inc. v. Land, et al., Civil Action No. 28540, an action similar in nature to the case at bar. Under date of December 8, 1944, the same Kenneth F. Clark, for the Price Adjustment Board wrote to counsel for Luckenbach as follows:

> "We will wait a reasonable time for those who have not submitted figures, but it looks as though we may reach a point very soon where we will have to enter unilateral orders determining excessive profits on the basis of such figures as we have. I should much prefer to feel that the owners had presented their case as they believe it should be considered, and they have all had ample opportunity so to do up to the present, but only a few have responded." (Luckenbach Complaint p. 54).

Again, on December 16, 1944, the same Kenneth F. Clark for the Price Adjustment Board wrote to counsel for Luckenbach, as follows:

> "Furthermore, in consideration of the Red Sea operation, this Board will not depart from the informality which has attended all of its inquiries thus far into the question of whether or not excessive profits have been realized in a particular case.
>
> * * * * * * * *
>
> "This Board, however, will not hesitate to issue a unilateral determination because renegotiation must be concluded either by agreement or by unilateral determination." (See Luckenbach Complaint p. 59)

(d) *The Nature of the Determination and Demand for Submission of Data is Such That Equity May Intervene.*

Section 403(e) of the Renegotiation Act (Pamphlet p. 4) authorizes the Secretary of each Department

> "to demand of any contractor who holds contracts *with respect to which the provisions of this section are applicable*" (Italics ours)

statements of costs and other financial data in such form and detail as he may require. Criminal penalties are imposed for wilful failure or refusal to comply with such demand or requirement. Counsel for petitioners argue that since the Board's letter of May 23, 1944, was couched in polite language, it merely constitutes a "request", as distinguished from a demand.

Petitioners have no right to demand the submission of statements, information and financial data for the purpose of determining excessive profits under contracts, except those with respect to which the Act applies.

Administrative determinations such as have been made by petitioners in this case, may, and do, if uncontested, determine, for all practical purposes, the respondent's rights or obligations under the Renegotiation Act with respect to its charters with the British Ministry, as effectively as the judgment of a court. *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 408.

Therefore, where such determinations are beyond the scope of the statute, as is the case here, it is within the jurisdiction of a court of equity to enjoin the enforcement of such determinations and demands, and the further application of the provisions of the Act to contracts which clearly are not subject to its provisions.

Petitioners' suggestion that the determinations and demands complained of herein, had reference to contracts with a "Department", and not to these specific contracts, is not in accord with facts of which petitioners have knowledge.

On May 24, 1944, one day following the notice that respondent's charters were subject to the provisions of the Renegotiation Act, the War Shipping Administrator (who was also Chairman of the Commission) through the War Shipping Administration Price Adjustment Board notified respondent that "The matter of conducting your statutory renegotiation proceedings has been assigned to this office", and called attention to the fact that renegotiation for fiscal years ending on or before June 30, 1943 is controlled by the Renegotiation Act of 1942, as amended, and with respect to fiscal years ending subsequent to June 30, 1943, is controlled by the Renegotiation Act of 1943. (See Appendix 1, p. 69, *infra.*)

In view of this fact, and the conduct of petitioners toward other companies with respect to their Red Sea charters, (See footnote 12, p. 36, *infra*), it cannot be maintained that the notice with respect to the Red Sea charters had reference to any of respondent's contracts with a Department.

If the rejection and determination referred to above are correct, respondent may not lawfully refuse to furnish statements of actual cost and such other financial statements as the petitioners may require, and the reason it may not refuse is that the petitioners have, in effect, *ordered* the submission of such statements. It is obviously incorrect to state, as the District Court did in its decision, that no order of any sort has been issued to the respondent herein. The petitioners have demanded that the respondent furnish statements, information and financial data on the erroneous determination which has been made that the charters involved herein are contracts "with respect to which the provisions of this section (Renegotiation Act) are applicable." That is an "order." Refusal by the respondent to comply with it is punishable by a severe fine or imprisonment or both. Moreover, it is void *ab initio* and equity may relieve against it.

The Renegotiation Act of 1942 does not authorize the issuance of any "orders" *except* to the extent that it confers

upon the Secretaries the right "*to demand*" (to order) the submission of financial data and other statements. If the demand to furnish financial statements and other data under penalty of criminal punishment is not an order, then it is difficult to understand when an order ever would be said to have been made under the Renegotiation Act of 1942.

In *Shields* v. *Utah Idaho Central Railroad Company*, 305 U. S. 177, the Court considered a case wherein the claim was made that an administrative "determination" was not an "order." That case presents a situation quite similar to that involved in the case at bar. The statute involved in that case (Railway Labor Act) imposed certain obligations on railroad carriers but expressly exempted interurban railway lines unless such railway lines be operated as a part of a general steam railroad system of transportation. The Act authorized and directed the Interstate Commerce Commission, upon request of the Mediation Board, to determine whether any line operated by electric power falls within the terms of the exception contained in the Railway Labor Act. (In the case here, the Act does not direct the Chairman to determine what contracts shall be renegotiated. The Congress made that determination when it enacted the law.) Such Railway Labor Act also imposed upon the Mediation Board the power and the duty to prescribe a form of notice which carriers subject to that Act were required to post under pain of criminal prosecution. (Here, if the charters are "contracts with respect to which the provisions of this Section are applicable" respondent is required to submit the information demanded, under pain of criminal prosecution). Acting under the statute, the Interstate Commerce Commission determined that the Utah Idaho Central Railroad Company was not within the exception contained in the Railway Labor Act, that is, that the railroad was subject to the Railway Labor Act. Thereupon, the Mediation Board requested the posting by the railroad of a form of notice. The Company refused to post such notice and brought suit to enjoin the United States Attorney from

prosecuting any proceeding based upon an alleged violation of the Railway Labor Act by the Company. One of the questions before the Court was whether the *determination* of the Interstate Commerce Commission, to the effect that the Utah Idaho Central Railroad was subject to the Railway Labor Act, could be regarded as an "order" which was binding upon the Mediation Board. In holding that the determination was an order the Court stated: (p. 182)

> "We have held that the determination of the Commission is not an '*order*' reviewable under the Urgent Deficiencies Act of October 22, 1913. *Shannahan* v. *United States*, 303 U. S. 596, supra. But we have not held that the determination of the Commission was not subject to judicial review by other procedure, a question which, as we said in the Shannahan case, we had no occasion there to consider. Id., at p. 603. The nature of the determination points to the propriety of judicial review. For, while the determination is made by the Interstate Commerce Commission for the purposes of the Railway Labor Act and not for further proceedings by the Commission itself, it is none the less a part of a regulatory scheme. *It has the effect, if validly made, of subjecting the respondent to the requirements of the Railway Labor Act* which was enacted to regulate the activities of transportation companies engaged in interstate commerce. * * * Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted, even though the complainant seeks to enjoin the bringing of criminal actions." (Italics ours)

The *Shields* case was referred to and its holding approved in *Utah Fuel Company* v. *National Bituminous Coal Commission*, 306 U. S. 56. In that case, plaintiff sought to enjoin the publication by the Coal Commission of certain data which it had furnished to the Commission as a Code Member under the Bituminous Coal Act. Plaintiff interpreted that Act as requiring that such information be kept secret while the defendant interpreted the Act as authorizing publication of such information and declared its in-

tention of publishing the same. Plaintiff filed a complaint in the District Court for the District of Columbia seeking an injunction against the threatened disclosure. The trial Court decided the case *on the merits* in favor of the Coal Commission holding that "the acts of the defendants sought to be enjoined are authorized by and not in violation of the Bituminous Coal Act."

Appeal was taken to the Court of Appeals where, as in the present case, the defendant alleged that the Court lacked jurisdiction. The Court of Appeals refused to consider the case on the merits and approved the dismissal of the bill on the grounds that plaintiff had failed to exhaust its administrative remedies, for which reason, it was held, equity jurisdiction could not be invoked. (69 App. D. C. 333).

On certiorari, this Court rejected the contention that the plaintiff had no standing in equity. While holding that the Bituminous Coal Act authorized the publication of the information, the Court reached its decision after an analysis of the pertinent provisions of the Act, and with reference to the claim that a bill in equity would not lie stated: (p. 59)

> "A question cognate to the one here presented was before us in *Shields* v. *Utah Idaho C. R. Co.*, (305 U. S. 177, Ante, 111, 59 S. Ct. 160), decided December 5, 1938, the date of the Court of Appeals' decision herein. We there declared, although determination by the Interstate Commerce Commission that a railroad was not 'interurban' did not constitute an 'order' reviewable under the Urgent Deficiencies Act of October, 1913, nevertheless, in the circumstances disclosed, it could be subjected to judicial review by bill in equity. • • •
>
> "Considering the circumstances here alleged, the great and obvious damage which might be suffered, the importance of the rights asserted, *and the lack of any other remedy*, we think complainants could properly ask relief in equity. The jurisdiction of a District Court is to be 'determined by the allegations of the bill, and usually if the bill or declaration makes a claim that if well founded is within the jurisdiction of the Court it is within that jurisdiction whether well founded or not.'" (Citations omitted.) (Italics ours)

The situation in the case at bar is very similar to that in *Trust Company* v. *Schnader*, 291 U. S. 24, (see also 293 U. S. 112), where appellant sought to enjoin officials of the Commonwealth of Pennsylvania from attempting to impose and collect an inheritance tax. The appellee contended that the appellant had an adequate remedy at law as it could appeal from the appraisement when made, to the County Court which had jurisdiction to pass on both the amount of tax and the legality of its imposition, and that since this procedure had not been followed, the bill was prematurely filed. The Court in denying this contention stated: (p. 34)

> "* * * However, in view of the allegations of the bill, we are not inclined to hold the suit premature. The bill charges that the Secretary of Revenue has refused to issue a waiver of tax, and that the Attorney General has notified the appellant and the State's appraiser the property is subject to the tax, and the appellant's claim for exemption will be denied. The Commonwealth's law officers plainly intend to perform what they consider their duty, and will, unless restrained, cause the assessment and imposition of the tax. The action the legality of which is challenged thus appears sufficiently imminent and certain to justify the intervention of a court of equity."

The fundamental findings or determinations with respect to respondent's charters have already been made, and a demand has been issued requiring, under sanction of criminal penalties, the submission of financial statements and other data to enable the petitioners to determine the amount of alleged excessive profits. Petitioners plainly "intend to perform what they consider their duty and will unless restrained," further invade the legal rights of respondent by withholding sums due it from the United States, or causing the respondent to become plaintiff or defendant in a multiplicity of suits.

Actions taken by the Board subsequent to the filing of the complaint herein with respect to charter parties entered into by the British Ministry with other ship own-

ers, clearly show that the allegation in the complaint that petitioners "intend to and will" make "a unilateral determination of alleged excessive profits under the charter agreements" and "unlawfully withhold amounts due the (respondent) from the United States" are not mere predictions.[12] They are realities and it is obvious from their conduct that petitioners will, unless restrained, deprive respondent of a portion of the proceeds of its contracts with the British Ministry.

Reference is made by petitioners in their brief, at page 17 (Footnote 10) to a letter from the Board, outlining what is now claimed to be the Board's practice regarding unilateral determinations with respect to whether excessive profits "within the meaning of the Act may have been realized by the contractor from contracts with the United States * * * as defined in Section 403 of the Act." (Petitioners' brief, p. 67) This device, obviously was conceived by the Board between the dates of the Board's notices to *Luckenbach Steamship Company, Inc.*, on December 8 and 16, 1944 (see footnote 11, page 29) and the date of the Board's notice to the Isthmian Steamship Company, under date of June 15, 1945. (See footnote 12.) The state-

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[12] Isthmian Steamship Company v. Land, et al., Civil Action No. 29546, referred to in the brief in support of Petition for Certiorari, is a case similar in nature to the one at bar, and involving charters with the British Ministry entered into in the same form and under similar circumstances as those in issue here. On June 15, 1945, the Board notified the Isthmian Steamship Company that it "has approved the attached recommendation as to the amount of excessive profits with respect to the application of the Renegotiation Act to the so-called Red Sea Space Charter Contracts of your corporation."

The "attached recommendation" was that the vessel owner be requested to refund to the United States $959,525.74, less tax credit, if any; that the company be afforded a period of two weeks within which to indicate its approval or disapproval thereof, with an opportunity to file written objections and that

> "Any agreement or order embodying a determination of excessive profit should be limited to the contracts here under review * * *. (See complaint in the above-entitled case.)

ment of the Board in the letter constituting the appendix to petitioners' brief, that it at no time understood the administrative orders by which its authority was derived, authorized it to do more than make recommendations to the Chairman (Petitioners' brief, page 68) is in direct conflict with statements in the Board's notice to *Luckenbach*, supra, that "This Board, however, will not hesitate *to issue a unilateral determination*," and that "* * * it looks as though we may reach a point very soon where we will have *to enter unilateral orders determining excessive profits* on the basis ~~of such figures~~ as we have." (Italics ours).

However, petitioners may not confer upon themselves jurisdiction which was not delegated to them by Congress, to make determinations with respect to contracts with a foreign government, even by resort to the device outlined in the Board's letter appended to petitioners' brief. The procedure outlined therein can lawfully relate only to contracts with a Department.

II.

The Existence of an Administrative Procedure for the Determination of Excessive Profits Which may be Realized Under Contracts with a "Department," Does Not Deprive the Courts of Jurisdiction to Restrain the Unauthorized Renegotiation of Contracts Between Respondent and a Foreign Government.

Petitioners, conceding that the charter parties in controversy are contracts between respondent and the British Government, nevertheless maintain that respondent is not entitled to the relief sought. Their contentions are supported by arguments which may be summarized as follows:

1. That the Renegotiation Act prescribes a procedure, administrative in character, for determining the amount of excessive profits realized under contracts with a Department as defined in the Renegotiation Act;

2. That authority to make such determination includes jurisdiction to determine that respondent's charters, the provisions of which show them to be with a foreign government, are contracts with a Department;

3. That notwithstanding the fact that the provisions of the contracts involved show them to be with a foreign government, if the Board, the Chairman, and the Tax Court determine that they are with a Department, that determination is final and may not be reviewed by any court. This, they assert, is because of the exclusive nature of the administrative remedy provided for determining the amount of excessive profits under contracts with a "Department."

4. Petitioners actually go further and say that if a member of the staff of the Board, speaking for himself and not for the Board, expresses a personal opinion that such charters are contracts with the Commission and are, therefore, subject to the provisions of the Renegotiation Act, and "requests" the submission of information, statements, and financial data in connection therewith, respondent has no standing in Court to obtain relief, but must submit to the renegotiation of such charters regardless of whether or not Congress has subjected them to renegotiation;

That argument refutes itself by making the administrative agent independent of the law which created it and by denying to the courts any preventive power whatsoever in the field of renegotiation. The argument asserts that whatever is done in the name of renegotiation must be free from judicial interference until after the renegotiation officials shall have accomplished their purpose, and that it is only then, if at all, that the respondent may have recourse to a court for a determination of the question of whether contracts with a foreign government were subject to the law in the first place.

Petitioners do not concede that even then would respondent be able to maintain a suit to recover the money which had been wrongfully taken from it. They assert that the provisions of the Renegotiation Act conferring exclusive jurisdiction to finally determine the amount, if any, of excessive profits and providing that such determination shall not be reviewed or redetermined by any other court or agency constitute, in effect, a withdrawal of the consent of the United States to be sued for the recovery of monies so illegally withheld.

The prevention of a multiplicity of unnecessary actions and the curbing of abuses of authority by Government bureau heads and administrative officers is one of the well-established bases for the intervention of equity. Whether the Tax Court is expert at profit questions and whether the judicial remedies available under the Renegotiation Act accord due process in the determination of excessive profits, are questions which do not have any bearing in a case such as the instant case, wherein the sole question is whether the Renegotiation Act is being violated by the officials appointed to enforce it.

Petitioners contend that if the issue presented in this case is decided on its merits by the Court, it makes available a means to war contractors of effectively halting renegotiation proceedings at the threshold for substantial periods of time (Petition for Certiorari p. 10) and would "as a practical matter play havoc with the statutory scheme for redetermination" (Petitioners' brief p. 38).

That argument, it is submitted, is sheer sophistry. It is not only wholly unfounded in law, but it is contrary to the facts.

There has been no delay in the renegotiation of respondent's contracts with any of the departments specified in the Renegotiation Act because of this suit.

The "statutory renegotiation proceedings" of such contracts have progressed at the pace set by the War Shipping Administration Price Adjustment Board to which such con-

tracts have been assigned for renegotiation.[13] Information and data called for by such Board have been filed and conferences have been held between respondent and that Board with respect to such renegotiation.

The rendition of a decision on the merits in this case will not interfere with the renegotiation task of the departments but will rather induce the departments to confine themselves to the task which Congress has appointed for them. It is a curious argument which seeks to justify the violation of a right by saying that if the illegal act is prevented by the Court, other persons would also seek judicial recourse against the violation of similar rights. That is what the equity courts are for—to prevent the doing of wrongs. In addition to the respondent, fifteen other steamship companies are being threatened by the petitioners with the same wrong which this Court is asked to enjoin. Can any man conscientiously state that the administrative processes of Government will be less clogged by sixteen companies pursuing the circuitous remedies recommended in the petitioners' brief than by permitting the instant case to be decided on its merits so that a precedent will be furnished for the issue which confronts all such companies?

To say, as the petitioners do, that this suit is one in which the Court is asked to interfere with the official discretion of government officers, entirely misconceives respondent's legal rights supporting its standing to maintain this action. To prevent a government officer from doing what he has no legal right to do, is not an interference with his discretion. *Ex parte Young*, 209 U. S. 123, 159. If such officer has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do. *Noble* v. *Union River Logging R. Company*, 147 U. S. 165.

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[13] The War Shipping Administrator was, until his resignation January 15, 1946, the same individual as the Chairman of the Maritime Commission.

It is no answer to say that the administrative body may, upon consideration, determine that no excessive profits were realized. The respondent is entitled to come into Court, *not* to review action within the discretionary authority of the petitioners to render a favorable, rather than an adverse decision, but because of erroneous determinations of law completely outside the petitioners' authority. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 134.

Respondent relies upon the familiar principle that "there is no place in our Constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action." *Garfield* v. *Goldsby*, 211 U. S. 249, 262.

The principles governing the use of injunctions against administrative officers were summarized in *Proctor and Gamble* v. *Coe*, 68 App. D. C. 246, 96 F. (2d) 518. (Cert. Denied 305 U. S. 604) That was an appeal from an order of the District Court dismissing a bill to enjoin the Commissioner of Patents from cancelling a trade mark until litigation in the Federal Court in New Jersey should be terminated. The Commissioner of Patents had held the trade marks should be cancelled pursuant to proceedings had in the Patent Office, and this decision had been affirmed by the United States Court of Customs and Patent Appeals. Subsequently, the District Court for New Jersey dismissed litigation by which it was sought to have Proctor and Gamble Company deliver up its trade mark to the Commissioner of Patents for cancellation on the ground that the decision of the Court of Customs and Patent Appeals made the question of cancellation *res judicata*. The Court said: (p. 249)

> "The following tests have been used to uphold the exercise of judicial restraint upon executive action under valid laws: (1) *Where an officer*, insisting that he has the warrant of the statute, *is* transcending its bounds, and thus *unlawfully assuming to exercise the*

power of government (Philadelphia Co. v. Stimson, supra), (2) *where an officer attempts to enlarge his power, or to usurp power* (Waite v. Macy, supra); or (3) where his act is based upon a clear mistake of law (American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 109, 110, 23 S. Ct. 33, 47 L. Ed. 90); (4) *where the action* of the officer or administrative body *is clearly beyond its power and in violation of the statute* (citations omitted); (5) where an officer has acted, or threatens to act, in a capricious and arbitrary manner (Commercial Solvents Corp. v. Mellon, 51 App. D. C. 146, 277 F. 548, 550, and cases there cited); (6) where the act of the officer, 'under any view that could be taken of the facts that were laid before him, was ultra vires, and beyond the scope of his authority (and) he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do.'" (Citations omitted) (Italics ours.)

The Court has recently said in a case involving the Renegotiation Act, that where equitable relief is necessary to prevent a trespass against complainant's property by an administrative official, acting as an individual and not as an officer of the government, it will be granted. *Mine Safety Appliances Company* v. *Forrestal*, No. 71 this Term, decided December 10, 1945.

The petitioners endeavor to support their novel argument with the line of decisions of which *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41, is typical. Those cases, however, are *not authority for petitioners'* contentions. The *Myers* case is one of a long line of decisions which have established the principle that where administrative officers are acting within the authority conferred by a valid statute, the complainant must first comply with the prescribed procedure before seeking relief in the courts. But the administrative procedure must be an adequate one. *Gilchrist* v. *Interborough Company*, 279 U. S. 159. The *Myers* case was a suit to enjoin the holding of a hearing

by the National Labor Relations Board upon a complaint which had been filed, charging a violation of the National Labor Relations Act. That Act vested the exclusive power in the Board and the Circuit Court of Appeals to prevent any person from engaging in an unfair practice affecting commerce. This grant of exclusive power was sustained because "the Act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board." *Myers* v. *Bethlehem Shipbuilding Corporation, supra*, p. 48.

The Renegotiation Act provides no procedure except for the purpose of determining the amounts of excessive profits under contracts with a Department.

All that is necessary is for the Chairman, or those to whom he has delegated his authority, to form an opinion that the profits realized under a contract with the Commission are, or may be, excessive. He is then required to renegotiate, that is, refix the contract price, either by agreement or by unilateral action.

The statute in the *Myers* case granted the Board no power enforcing obedience to its subpoena to testify or produce written evidence.

The Renegotiation Act provides that the Secretary of each department may require the production of information and financial data with respect to any contracts to which the statute applies. Wilful failure to comply with such demands may result in criminal penalties.

Under the statute in the *Myers* case, the Board was without power to enforce its order. Application to a Circuit Court of Appeals was required, and only when sustained by it could the order be enforced.

Under the Renegotiation Act, the Chairman may withhold amounts which may be due to the complainant under contracts with the United States. The filing of a petition in the Tax Court for a redetermination of the amount of exces-

sive profits does not operate to stay the withholding of such amounts. (Pamphlet, p. 38)

The statute under consideration in the *Myers* case provided for a review by the Circuit Court of Appeals of findings of the Board. The Renegotiation Act provides that the final determination of the Tax Court of the amount, if any, of excessive profits "shall not be reviewed or redetermined by any court or agency."

It is obvious from this comparison that the principle decided in the *Myers* case is not applicable to the law or the facts in this case.

The other cases relied upon by petitioners are to the same effect.

Newport News Shipbuilding and Drydock Company v. *Schauffler*, 303 U. S. 54 involved, as did the *Myers* case, the National Labor Relations Act and was decided upon the same basis as the *Myers* case.

In *California* v. *Latimer*, 305 U. S. 255, the Board could not enforce its orders, except by resort to legal proceedings.

In *Power Commission* v. *Edison*, 304 U. S. 375, the Commission had to apply to the courts to enforce its orders for the production of books, etc.

In *Petroleum* v. *Commission*, 304 U. S. 209, the statute contained "detailed provisions for hearings and judicial review."

In *Natural Gas Pipeline Company* v. *Slattery*, 302 U. S. 300, the statute provided for an adequate administrative remedy which included a hearing. But this Court pointed out (p. 310) that if the Commission had refused to suspend the operation of penalties, resort to the Courts would have been justified.

In *Miles Laboratories* v. *Federal Trade Commission*, 140 F. 2d, 683 (App. D. C.) (Certiorari denied 322 U. S. 752) the orders of the Commission were, by the terms of the statute, subjected to court review.

In *Coffman* v. *Breeze*, 323 U. S. 316, the statute provided a remedy against the United States in the Court of Claims,

and what is more important, provided that this was the sole and exclusive remedy, while guaranteeing just compensation, and not such an amount as, in the opinion of executive officers, should be allowed.

Levers v. *Anderson*, No. 51 this term, decided November 5, 1945, involved a statute which by its terms provided for judicial review.

In the light of the foregoing decisions, the argument of petitioners in the Court below that the Court lacks jurisdiction to grant the relief sought is palpably untenable. It is perfectly clear that if the determinations and demands already made, exceed the authority conferred upon the Chairman by law, petitioners may be enjoined from carrying them into effect.[14]

III.

Failure to Pursue an Administrative Remedy is Not a Valid Ground for Denial of the Relief Sought by Respondent Because no Such Remedy is Available.

Petitioners argue that a comparison of the language of the Renegotiation Act with respect to the determination of excessive profits under contracts with a Department, with the language of the Internal Revenue Code relating to the redetermination of a tax deficiency, discloses the intention of Congress to confer jurisdiction on the Tax Court to make determinations with respect to contracts with foreign governments, which shall be final, and not subject to review by the Courts.

That contention, however, disregards the plain language of the Act and the legislative history thereof. The Renegotiation Act provides in Section 403(c)(2) that any contractor aggrieved by a determination of the Secretary *as*

[14] See *Bradley* v. *Richmond*, 227 U. S. 477, *First National Bank* v. *Weld County*, 264 U. S. 450, *Work* v. *Louisiana*, 269 U. S. 250, *Colorado* v. *Toll*, 268 U. S. 228, *Anniston Manufacturing Company* v. *Davis*, 301 U. S. 337, *Minnesota Ex Rel. Pearson* v. *Probate Court*, 309 U. S. 270.

to the existence of excessive profits, may file a petition with the Tax Court for a redetermination thereof. Upon the filing of such petition, the Tax Court "shall have exclusive jurisdiction, by order, to finally determine *the amount, if any, of such excessive profits* * * * and such determination shall not be reviewed or redetermined by any court or agency." (Italics ours.) The clarity of this provision was recognized by the Court in *Mine Safety Appliances Co.* v. *Forrestal, supra.*

The fact, however, that the Tax Court is given the power to make a final determination of excessive profits under contracts with a Department, does not justify the conclusion drawn by the petitioners that they, or the Tax Court, have jurisdiction to determine that contracts of a character not specified in the Renegotiation Act, are subject to the provisions thereof. As heretofore stated, the Congress determined that *only* those contracts which are with one of the Departments specified in the Act, are subject to renegotiation. Whether a contract is one with a Department, is to be determined by its provisions. The fact that one of the Departments, in this case the Maritime Commission, notified the holder of a contract with a foreign government that the payments required to be made under the contract would be paid by the Department out of lend-lease funds, pursuant to an arrangement between the United States and the foreign government, does not in any way alter the provisions of contract with respect to who are the parties to, and bound by, it. *Algoma Lumber Co.* v. *United States, supra.*

The determination of excessive profits which may be realized under contracts with a Department is a complicated procedure. The Act prescribes certain factors which must be taken into consideration in the determination of excessive profits. (Pamphlet, pp. 19, 20) These standards are necessarily general, for it is obvious that a dollar amount or value cannot be ascribed to any one factor. All the varied situations and circumstances which may arise with respect

to the efficiency of the operator, the reasonableness of costs and profits as related to volume of production, the amount and source of public and private capital employed and net worth, the extent of risk assumed, the character of the business, and such other factors which the consideration of the public interest and fair and equitable dealing may require, are all left to the determination of the Tax Court as to whether they are covered under a particular contract with a Department. The complexity of making the necessary determinations as to the extent to which these and many other factors shall be taken into account, was the very reason that the Congress selected the Tax Court, rather than some other agency, to make a final determination of the amount of excessive profits realized under contracts with a Department.[15]

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[15] The Committee on Ways and Means, of the House of Representatives, in its report upon the Revenue Bill of 1943 (Report No. 871, House of Representatives, 78th Congress, 1st Session) stated, with reference to the duties of the Tax Court (pp. 76-77):

> "Under existing law there is no right of appeal or review whereby the contractor may have the *question of his excessive profits* redetermined. * * *
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> "Any contractor * * * who feels aggrieved by an order of the Board (a unilateral determination) *determining an amount of excessive profits* received or accrued by the contractor * * * within 90 days after the entry of such order or unilateral determination, may file a petition with The Tax Court of the United States for *a redetermination of such profits*. That court will have exclusive jurisdiction, by an order, to make a final determination *as to whether excessive profits have been received* or accrued, * * * and The Tax Court's determination may not be reviewed or redetermined by any other court or agency. * * *
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> * * * *
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> "* * * It is provided that the contractor * * * is to have the burden of going forward with the evidence, whether as to the existence of excessive profits or as to the amount thereof."
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> * * * *
>
> "The Tax Court of the United States is peculiarly fitted to determine what is fair price and what is fair profit, having long been engaged in the determination of similar questions and being thoroughly equipped for this purpose." (Italics ours)

Added support is given to this construction by the testimony of the Honorable Francis M. Shea, Assistant Attorney General, (who was on the brief as counsel for petitioners in the Court below) at the hearings before the Committee on Finance, United States Senate, on the bill H. R. 3687, 78th Congress, 1st Session, that (p. 1033)—

> "Obviously, in our judgment, if any large proportion of these contracts gets into court on the issue of *what is the reasonable profit that should be*, or should have been, *received under them*, no machinery of litigation can do the job. * * * If this job of renegotiation is to be done effectively and fairly, *the great bulk of it must be disposed of by administrative procedures* and not by litigation." (Italics ours.)

The exclusive remedy for the determination of the factual question as to the existence and the amount of excessive profits realized from contracts with a Department, does not confer upon the petitioners and the Tax Court the power, which they do not otherwise have, to make any determination with respect to respondent's contracts with the British Ministry.

An argument similar to that submitted by petitioners herein was rejected by the Court in *Stark et al.* v. *Wickard*, 321 U. S. 288, where the Secretary of Agriculture attempted to withhold certain sums owed to the plaintiffs from third parties under cover of the Agricultural Market Agreement Act of 1937, and the plaintiff sought to enjoin such act as being outside the authority conferred upon the Secretary by such Act. The Court stated (p. 309):

> "Here, there is no forum, other than the ordinary courts, to hear this complaint. When, as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the

exercise of their general jurisdiction. *When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted.* (Authorities) *This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyound the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction.* Cf. *United States* v. *Morgan*, 307 U. S. 183, 190-191. This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents. The powers of departments, boards and administrative agencies are subject to expansion, contraction or abolition at the will of the legislative and executive branches of the government. These branches have the resources and personnel to examine into the working of the various establishments to determine the necessary changes of function or management. But under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons *or by the exertion of unauthorized administrative power.* (Italics ours.)

"It is suggested that such a ruling puts the agency at the mercy of objectors, since any provisions of the Order may be attacked as unauthorized by each producer. To this objection there are adequate answers. * * * Technical details of the milk business are left to the Secretary and his aides. The expenses of litigation deter frivolous contentions. If numerous parallel cases are filed, the courts have ample authority to stay useless litigation until the determination of a test case. *Cf. Landis* v. *North American Co.*, 299 U. S. 248. Should some provisions of an order be held to exceed the statutory power of the Secretary, it is well within the power of a court of equity to so mold a decree as

> to preserve in the public interest the operation of the portion of the order which is not attacked pending amendment." [16]

The Act under consideration in that case provided an administrative remedy with respect to matters coming within the jurisdiction of the Secretary of Agriculture. Similarly, the Renegotiation Act provides an administrative remedy for the determination of excessive profits under contracts within the jurisdiction of petitioners. The statute in the *Stark* case required the Secretary to hold a hearing prior to the issuance of a marketing order. The Renegotiation Act requires no hearing, and none was held prior to the determinations complained of herein. In fact, monies of respondent may be withheld and covered into the Treasury of the United States prior to any hearing upon the question of whether excessive profits existed. There is no provision for any hearing at all on the question already determined by petitioners, that respondent's charters are contracts with the Commission.

The Court in the *Stark* case decided exactly what respondent is contending for here: That (p. 307)—

> "It can hardly be said that opportunity to be heard on matters within the Secretary's discretion would foreclose an attack on the inclusion in the Order of provisions entirely outside of the Secretary's delegated powers."

A similar conclusion was reached in *Lukens Steel Company* v. *Perkins*, 70 App. D. C. 354, 107 F. (2d), 627. The appellants there were not challenging the validity of the statute, but contended instead that appellees had acted and threatened to act in violation of the statute, and without authority of any kind. Appellees contended there, as petitioners are contending here, that the complaint should be

[16] See also *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, *Philadelphia Company* v. *Stimson*, 223 U. S. 605, *Waite* v. *Macy*, 246 U. S. 606.

dismissed because, among other things, the appellees had not exhausted their administrative remedy, but the Court answered that contention in the following language:

> "But no administrative remedy is provided by the act to meet the grievances alleged in the complaint, and no administrative remedy is otherwise available. The act does not contemplate unlawful conduct beyond its terms and entirely outside the scope of its authority."

The Court went further and stated:

> "Section 6 assumes a proper determination *within the scope of the Act* and pursuant to the authority thereof. The procedure therein provided could not possibly be used to challenge the authority of appellees to act as they have done. Moreover, even if that procedure were available to appellants, *its use would admit the legality* of the protested determination and leave them at the mercy of appellees in carrying out their unlawful purposes."[17] (Italics ours)

This Court reversed the case (310 U. S. 113), on the ground that the complainants had not shown any injury or threat to a particular right of their own, as distinguished from a mere possible injury to the public, but indicated that the result might have been different if the contested action of the restrained officials had invaded private rights in a manner amounting to a tortious violation.

The cases of *Blair* v. *Oesterlein*, 275 U. S. 220, *Heiner* v. *Diamond Alkali Company*, 288 U. S. 502, and *Williamsport Company* v. *United States*, 277 U. S. 551, relied upon by petitioners, are not to the contrary. The principle decided in those cases has no application to the facts in this case. In the *Oesterlein* case, the court said that the question of whether or not two years considered together, instead of separately, by the Commissioner of Internal Revenue, in determining whether a deficiency existed, was not properly

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[17] To the same effect is *In Re Fassett*, 142 U. S. 479, discussed in respondent's brief in opposition, pp. 29-31.

before the Court because it had not been previously raised. In any event, the determinations of the Commissioner of Internal Revenue were subject to review by the Courts. If a determination of excessive profits had been made by the Commissioner under Sections 327 and 328 of the Internal Revenue Act of 1918 (40 Stat. 1057) with respect to a person not a taxpayer, a question analogous to the question here, the result in those cases would have been different.

There is no reason in law why the respondent should be required to furnish the information and data demanded of it unless the charter agreements are contracts with the Commission. That question is properly before this Court for determination and obviously cannot be determined in any statutory forum provided in the Renegotiation Act.

IV.

The Tax Court Procedure Under the Renegotiation Act Does Not Provide Respondent With an Adequate Remedy at Law, and None is Otherwise Available.

If the Congress had intended to confer upon the petitioners jurisdiction to require the renegotiation of such contracts as in their discretion they might determine should be renegotiated, it would have established standards for their guidance in making such determinations. Furthermore, it would have provided for a review by the courts of decisions of the Tax Court in the same manner as is provided for a review of the decisions of that Court with respect to a redetermination of tax deficiencies, in order to afford adequate opportunity to secure judicial protection against just such arbitrary and unlawful action as has occurred in this case.

Not only was no such provision included in the Act, but it is specifically provided that the determination of the Tax Court shall *not* be reviewed by any court or agency.

Petitioners have confused the power of the Tax Court—indeed, the necessity—to decide questions with respect to

coverage of certain factors which the Act requires to be taken into consideration in renegotiating contracts subject to it,[18] with jurisdiction of such Court to decide that a contract with a foreign government is a contract with the Commission, or to make any determination at all with respect to such contract. *Endicott Johnson Corporation* v. *Perkins*, 317 U. S. 501, relied upon by petitioners, is not authority for their position in this regard.

In that case, the Court held that the Secretary of Labor had authority to make determinations as to whether a contract with the government for the supply of materials, covered certain plants and employees of the company, in reaching a conclusion as to whether the company was complying with the contract in paying the minimum wages specified therein, and limiting the hours of labor of its employees to the maximum specified in the law and the contract. The Court did not say that if the Secretary of Labor had determined that a contract between the company and a foreign government was subject to the provisions of the Walsh-Healy Act and had undertaken an investigation thereunder, and demanded the production of

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[18] The Ways and Means Committee, in reporting the Revenue Bill of 1943, called attention to some of the questions of "coverage" involved in arriving at the amount of excessive profits. The Committee stated (Report No. 871, supra, p. 81):

> "• • • Costs that are unreasonable or not properly chargeable to the contract or subcontract, in the opinion of the Board or of The Tax Court of the United States, as the case may be, are disallowed. Subject to these qualifications, items of the character allowed as deductions or exclusions in computing net income for income tax purposes are, with the exception of taxes measured by income, allowable to the extent that they are allocable to such contracts or subcontracts.
>
> "All items of the character allowed as deductions and exclusions for income and excess profits taxes (including the current amortization deduction), to the extent allocable to such contracts and subcontracts allowed as items of cost. Federal taxes are not allowable as items of cost. After the excessive profits have been determined, however, credit is allowed for any income and excess profits taxes paid with respect thereto."

payroll data and other information, that she would have had authority to do so. Such a holding would have been contrary to the decisions in the cases heretofore cited.

Whether the administrative procedure established for the determination of the amount of excessive profits under contracts which the Congress has determined should be renegotiated—that is, contracts with a department—is adequate to afford due process for that purpose, is not involved in this case.

The Department of Justice, through the Honorable Francis M. Shea, Assistant Attorney General, officially advised the Committee on Finance of the United States Senate that the provision for redetermination by the Tax Court did not provide procedural due process, even with respect to that question. In his testimony in the hearings upon the bill H. R. 3687, 78th Congress, 1st Session (Revenue Act of 1943), he stated with respect to the administrative provisions of this Act, which were then under consideration, that (p. 1037):

> "Provision for appeal to the Tax Court *very probably does not constitute an adequate remedy at law* which specifies whatever right there may be to judicial process. * * * I do not say that if this bill were properly drafted for the purpose Congress might not thereby constitute The Tax Court one of the lower Federal courts and invest it with powers which would make it a fit tribunal for the satisfaction, by its review, of these fundamental constitutional rights. *I do think that Congress would have to go further than it has in this bill to make it a judicial tribunal.*" [19] (Italics ours.)

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[19] Mr. Shea, in his testimony before the Senate Committee on Finance, further stated: (p. 1033)

> "* * * by attempting to stop short of court review and make the last hearing a trial *de novo* in The Tax Court, which is but a part of the executive branch of the Government, *they are guilty of depriving the contractors of procedural due process*, which entitles them to court review of any claimed deprivation of fundamental constitutional rights." (Italics ours.)

In view of Mr. Shea's official advice to the Congress, and the subsequent change in the bill eliminating the duty of the Tax Court to make written findings of fact, (discussed in Br. in Opp., p. 29) the only reasonable conclusion that can be reached is that the Congress did not intend that the petitioners or the Tax Court should do more than ascertain and determine the amount of excessive profits realized under contracts to which the provisions of the Renegotiation Act are applicable.

The administrative remedy thus provided, by its very terms is inadequate to afford due process with respect to the determinations of petitioners and demands made upon respondent regarding its contracts with the British Ministry. Therefore, in the most favorable aspect of petitioners' contentions, whether the respondent could ever obtain relief at law, is a matter of speculation. In no view can it be said that there exists a plain, certain, adequate and complete remedy at law, in the absence of which respondent is entitled to relief in equity. Such lack of an adequate remedy in the Tax Court procedure is not cured, as suggested by petitioners (footnote 31, brief pp. 48 and 49) by the appropriation of funds referred to in such footnote. Clearly that appropriation was made for the purpose of repaying amounts withheld by the Secretary of any Department or the Board, in excess of "any amount finally ad-

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And, (at p. 1042)—

"Mr. Shea. So far as I can see, Senator, the consequence is going to be three or four duplications of full administrative hearings, without any provision for court review, and the gist of what we want to propose is that *adequate remedy* is not a multiplication of procedure; *it is one good trial and one good appeal on the administrative side, and a hearing by a court of those issues which should properly be reviewed by a court.*

"Senator Clark. Where the administrative agency is the final determining agency, it doesn't make any difference how many there are; *it does not mean that he has had his day in court.*

"Mr. Shea. *That is right.*" (Italics ours.)

judged or determined" by the Tax Court to be excessive profits.

The principle that the remedy upon its face must be adequate to meet the requirement of due process, in order to deprive an equity court of jurisdiction before such remedy is exhausted, was recently reaffirmed by this Court in *Yakus* v. *United States*, 321 U. S. 414. In that case petitioners had not availed themselves of the procedure set up by the Emergency Price Control Act by which persons subject to the maximum price regulations might test its validity. It was contended by petitioners that the administrative procedure was inadequate, but this Court overruled that contention in view of the fact that—(p. 437)

> "The emergency court has power to review all questions of law, including the question whether the Administrator's determination is supported by evidence, and any question of the denial of due process or any procedural error appropriately raised in the course of the proceedings. No reason is advanced why petitioners could not, throughout the statutory proceeding, raise and preserve any due process objection to the statute, the regulations, or the procedure, *and secure its full judicial review by the Emergency Court of Appeals and this Court.*" (Italics ours.)

And the Court stated, in line with previous decisions that—(p. 435)—

> "Only if we could say in advance of resort to the statutory procedure, *that it is incapable of according due process* to petitioners *could we conclude that they have shown any legal excuse for their failure to resort to it* or that their constitutional rights have been or will be infringed." (Italics ours.)

In the Renegotiation Act, there is no provision for any type of hearing until the injury sought to be prevented by this action has occurred. The subsequent hearing in the Tax Court is confined to an issue which is not present in this case. It is submitted in all earnestness, that under

such circumstances equity courts are not to be deprived of their jurisdiction to prevent the injuries complained of herein.

V.

A Proceeding Under the Declaratory Judgment Act is Appropriate for the Determination of the Rights of the Parties to a Controversy Even Though Another Remedy is Available.

It is fundamental that where rights are invaded as they have been here, or immediately threatened, Federal Courts may give relief by either traditional remedies or by declaratory judgment.[20]

Where a declaratory judgment will clarify and settle legal relations in issue and where it will terminate, and afford relief from uncertainty and controversy, it is an appropriate remedy.[21] And it is a remedy which may be granted without regard to the existence of a remedy elsewhere and even in the absence of alleging that "irreparable injury is threatened."[22]

There is here a controversy between parties who face each other in an adversary proceeding. The dispute is definite and concrete. Prior to the suit, the parties had taken adverse positions with respect to the questions in issue.

Respondent's legal and constitutional rights have been and are affected and brought into question by the conduct and threatened conduct of petitioners. The question of legality of the action of petitioners in determining to apply, and in applying the Renegotiation Act to the charter agreements entered into between the respondent and the British Government has arisen between the parties hereto; namely,

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[20] *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227.

[21] *Delno* v. *Market Street Railway Co.*, C. C. A. Cal. 1942, 124 F. (2d) 965.

[22] *Aetna Life Insurance Co.* v. *Haworth*, *supra*.

whether the Renegotiation Act confers upon petitioners authority to apply its provisions to said charter parties and to make the determinations heretofore made and to take further threatened action thereunder. This question is fundamental to all activity of the petitioners with respect to the renegotiation of such charter agreements. Respondent has persistently claimed that petitioners could not rightfully or lawfully determine that the charter agreement between the respondent and the British Government are contracts with the Maritime Commission and subject to the provisions of the Renegotiation Act; that they cannot rightfully or lawfully apply said Act to the charters or do any act or take any steps with respect thereto. Petitioners assert that they are legally authorized by the Renegotiation Act to apply said Act to such charters and have commenced renegotiation and made certain determinations with respect thereto. They have (1) definitely rejected respondent's claim that the charter agreements are not subject to the provisions of the Renegotiation Act; (2) have determined affirmatively that the charter agreements are contracts with the Commission, and (3) that a portion of the profits realized therefrom constitute excessive profits within the meaning of the Renegotiation Act. (R. 31, 32)

It is, of course, a well-settled principle of law that "where the Commission's order denies an exemption from the terms of the statute, as in the Intermountain Rate Cases (*United States* v. *Atchison, T. & S. F. R. Co.*, 234 U. S. 476), the road to the courts' jurisdiction seems to be clear. There is a constitutional 'case' or 'controversy,' *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; the requirements of equity are satisfied if disregard of the Commission's adverse action entails threat of oppressive penalties;" *Rochester Telephone Corp.* v. *United States, supra*, p. 132.

In the instant case, the contested determination that respondent's contracts with the British Ministry are contracts with the Commission and as such subject to the provisions of the Renegotiation Act, necessarily and immediately

carries direction of obedience to demands addressed to the respondent for the submission of information, statements and financial data under the provisions of Section 403(c) of the Renegotiation Act of 1942. (Pamphlet p. 4) By that fact is created a constitutional case or controversy within the scope of the Declaratory Judgment Act.

With respect to such charter agreements, petitioners plainly intend to perform what they consider their duty under the provisions of the Renegotiation Act and will, unless the Courts intervene, determine the portion of the profits resulting from the performance of such agreements, which, in their opinion, constitutes excessive profits within the meaning of the Renegotiation Act. They intend to and will withhold the amount, so determined by them, from sums due respondent on contracts with the United States.

A declaratory judgment in respect of whether the Congress has provided for the renegotiation of the charter agreements entered into between the respondent and the British Government would terminate the controversy between petitioners and respondent and remove all uncertainty between them with respect thereto, and would set said controversy at rest before it leads to a further invasion of respondent's rights. The renegotiation, when consummated by unilateral action of the petitioners, with consequent withholding of large amounts of respondent's monies now due or to become due on contracts which it holds with the United States, would give rise to much involved controversy and litigation, with claims and counter claims over a long period. It would result in a multiplicity of suits in various jurisdictions and put respondent to great expense and cause prejudicial uncertainty in respondent's financial position in respect to its shipping business. The respondent has no remedy or adequate means of relief against, or in avoidance of, the unlawful acts done and threatened, except by intervention of the Courts under the Declaratory Judgment Act or the traditional remedy of injunction.

This case, therefore, presents a controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the entering of a declaratory judgment.[23]

This proposition was recently upheld by the Court in *Spector Motor Service Inc.* v. *McLaughlin*, 323 U. S. 101, which was a suit brought in a United States District Court to enjoin the enforcement of a Connecticut State Tax and for a declaratory judgment that the statute did not apply to complainant.

The constitutionality of the statute had not been determined by the Courts of Connecticut with respect to the application of the statute to the business of petitioner. This Court held that a declaratory judgment proceeding was appropriate, stating:

> "The District Court had jurisdiction to entertain this bill and to give whatever relief is appropriate * * * *because of the uncertainty surrounding the adequacy of the Connecticut remedy.*" (Italics ours)

The case, therefore, was remanded to the District Court with directions to retain the bill pending the determination of proceedings in the state court.

In *Perkins* v. *Elg*, 69 App. D. C. 175, 99 F. (2d) 408 (affirmed 307 U. S. 325), the Court sustained the action of the District Court in granting an injunction and a declaratory judgment as well. In that case the complainant had been born in this country, of naturalized parents and during her infancy taken back to her parents' native land of Sweden. Upon reaching her majority she returned to this country and was given a passport. Later it was found that her father had no intention of again becoming a permanent resident of this country and she was immediately declared

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[23] *Maryland Casualty Company* v. *Pacific Coal and Oil Company*, 312 U. S. 270; *Brillhart* v. *Excess Insurance Co. of America*, 316 U. S. 491; *Great Lakes Dredge and Dock Company* v. *Huffman*, 319 U. S. 293.

to be in the country illegally. She was threatened with arrest and deportation in the event she did not leave the country voluntarily. However, as a matter of grace the threatened action was held in abeyance, but the officials of the Labor and State Departments still maintained that her entry was illegal. She brought suit to enjoin the threatened action on the part of the officials and also for a declaratory judgment, declaring her status as a citizen of the United States. The contention was made there that she had a remedy at law by submitting to arrest and testing the question by a writ of habeas corpus. But the Court of Appeals said:

> "The trial court, as we have seen, concluded that the case was properly brought within the declaratory judgment statute. We are of the same opinion.
>
> "* * * There is no other proceeding at law by which appellee could obtain an adjudication that she is a United States citizen,—certainly none by which she can obtain that adjudication without being subject to arrest and confinement until her case may be heard on a petition of habeas corpus. * * * she is entitled to a declaration of her political status, for her rights as a citizen are valuable rights,—certainly no less valuable than property rights,—and an actual and vital controversy exists between her and the government in relation to them."

The only difference in the *Ely* case and the case at bar is the kind of right involved. It is clear, therefore, that where an administrative agency is exceeding its statutory authority or where the remedy provided in the statute is inadequate, a declaratory judgment proceeding is proper.

VI.

Unless Respondent is Granted the Relief Sought, It Will Be Subjected to Multiplicity of Actions, and Exposed to the Danger That Sums of Money Which May be Withheld From it by Petitioners When Covered Into the Treasury, Will be Beyond Reach of Any Suit at Law.

It is well recognized that where a complainant may be subjected to the necessity of bringing numerous suits or defending numerous suits, that is sufficient to sustain the jurisdiction of an equity court. The nature of the contracts respondent has with various agencies of the United States, on account of which the petitioners might withhold or cause to be withheld, sums which they determine to be excessive profits realized under the charter agreements in question, are such that a multiplicity of suits in different jurisdictions would be necessary in an effort to recover the amounts so withheld. This assumes, of course, that the remedy would be available to respondent. It may be necessary for respondent to bring actions upon numerous contracts, some of which may be cognizable in the Court of Claims and others in the United States District Courts sitting in Admiralty. Respondent, therefore, will be subjected to the burden of a multiplicity of actions and be put under the burden of litigating with agencies of the United States Government which have no direct interest in this controversy. This alone is adequate to sustain equity jurisdiction.[24]

As the Court said in *Ex Parte Young, supra* (page 160):

> "It would be an injury to complainant to harrass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalities under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity."

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[24] *Wilson* v. *Illinois Southern Railway Co.*, 263 U. S. 574; *Union Pacific Railroad Co.* v. *Board of County Commissioners*, 247 U. S. 282; *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20; *Hopkins* v. *Southern California Telephone Co.*, 275 U. S. 393; *Ex Parte Young, supra.*

Moreover, were respondent remitted to numerous suits in order to recover amounts withheld by petitioners, the expense thereof would be such as to make the remedy elsewhere inadequate and the damage irreparable. Thus, in *Allen* v. *Regents*, 304 U. S. 439, the Court pointed out (p. 458)—

> • • • "And if the respondent is right that the statute is invalid as applied to its exhibitions, it ought not to have to incur the expense and burden of collection, return, and prosecution of claim for refund of a tax upon others which the State may not lawfully be required to collect. These extraordinary circumstances we think justify resort to equity."

It is submitted, therefore, that respondent should not be turned to other proceedings where the remedy, if available at all, is inadequate and the expense thereof would be so great as to constitute irreparable injury.

Once the money which may be withheld by petitioners on account of contracts between respondent and the United States, is turned into the Treasury and mingled with the general funds, it is by no means clear that respondent could ever effect a recovery thereof. The Renegotiation Act provides, Sec. 403(c)(2):

> "All money recovered in respect of amounts paid to the contractor from appropriations from the Treasury by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts."

That the danger is real is manifest from the Court's decision in *Robinson, et al.* v. *Deal, et al.* (App. D. C.), 145 F. (2d) 382, (Cert. Denied, 324 U. S. 850) where the Court stated (p. 384):

> "The fact that the fund in the *Haskins Bros.* case was derived from the imposition of a tax, while here it was from the imposition by Act of Congress of a condition to the sale of cotton produced in excess of allotment, is of no consequence. The controlling principle

> is based upon the presence of the fund at the time of suit in the Treasury. The fact, found by the District Court, that 'there is no congressional authority for withdrawal of money from the Treasury under the pool appropriation account for payment to plaintiffs and intervenors,' leaves the courts without power to interfere."

Doubt alone concerning respondent's right to recover its funds, once they are covered into the Treasury, is sufficient to sustain the jurisdiction of an equity Court. The remedy elsewhere to defeat jurisdiction here, must be equally "certain and in other ways efficient." [25]

But more important, whether the respondent would be relegated to the Court of Claims or to the Admiralty Court in suits on its contracts with the United States to recover moneys withheld, it would be subjected to the additional hazard of complete loss of all its rights. This is because there can be no recovery against the United States for tortious acts of its officers. Thus, this Court has said[26] (p. 208):

> • • • "The distinction between property taken under authorization of Congress and property appropriated without such authority has long been recognized. Acts of government officials in taking property without authorization of Congress confer no right of recovery upon the injured citizen." [27]

The Court said in the *North American Transportation and Trading Company* case that what an officer of the government had done without authority was tortious and created no liability on the part of the government.

Therefore, if the petitioners in this case, acting without authority of law, withhold or cause to be withheld from

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[25] *American Life Insurance Co.* v. *Stewart*, 300 U. S. 203.

[26] *United States* v. *Goltra*, 312 U. S. 203, 208.

[27] *United States* v. *North American Transportation and Trading Co.*, 253 U. S. 330; *Phelps* v. *United States*, 274 U. S. 341; *Hooe* v *United States*, 218 U. S. 322.

respondent moneys due it on contracts with the United States and consign the same to the Treasury, respondent may be completely barred from its recovery.

So long as petitioners have not actually seized respondent's property, an equity court—and only an equity court—can stay their hands. It can prevent the threatened unlawful action. The respondent should not be sent elsewhere, where once the mischief is done, there may be no remedy at all.

In the event petitioners should withhold moneys due respondent, it would lose not only the use of its money, but the interest thereon during at least a portion of time necessary to recover it. It could not in any forum, if the money be wrongfully withheld, recover interest during the whole time necessary to its recovery.[28]

The Act of March 3, 1911, c. 231 (36 Stat. 1141) as amended, 28 U. S. C. 284, expressly says:

> "No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, * * *."

The Suits in Admiralty Act, c. 315 (47 Stat. 420), 46 U. S. C. Sec. 745, provides that

> "no interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized hereunder."

The fact alone that in no action could respondent ever recover interest on the amount withheld from it, is ground for jurisdiction in equity. This is demonstrated by *Hopkins* v. *Southern California Telephone Co., supra.* Suit was brought by the Telephone Company to enjoin the county from seizing and selling certain telephone sets in satisfac-

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[28] *United States* v. *Goltra, supra; United States* v. *U. S. Fidelity & Guaranty Co.* (10 C. C. A., 1939), 106 F. (2d) 804, reversed on other grounds 309 U. S. 506; *Henkels* v. *Sutherland*, 271 U. S. 298.

tion of a tax which the company claimed was in conflict with the Federal Constitution. The Court pointed out:

> "In no permitted proceeding at law could interest upon payments be recovered for the time necessary to obtain judgments."

The significance of respondent's inability to recover interest in any such actions as petitioners suggest (as bearing on the inadequacy of such other remedies) is apparent also from *California* v. *Latimer*, 305 U. S. 255. The amount involved was $7,862.32. There the Court was able to find that payment would not cause irreparable injury because:

> "the amount paid with interest could be recovered if not due."

Here that item never would be recoverable.

VII.

This is Not a Suit Against the United States.

Petitioners did not in their motion to dismiss raise the issue that this is an action against the United States; neither has it heretofore been urged in their briefs.

The argument which they now make has been rejected so frequently by this Court that it hardly deserves any reply. It is a well established principle of law that if the conduct of an administrative official constitutes interference with the rights of the complainant with respect to matters not within his statutory authority, resort to equity for protection is not a suit against the United States. And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injur tive process on that ground.[29]

The *Mine Safety* case, *supra*, cited by petitioners does not modify that principle, but rather, reaffirms it. In that case,

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[29] *Philadelphia Company* v. *Stimson, supra; Waite* v. *Macy, supra; Stark* v. *Wickard, supra.*

the Secretary of the Navy had conducted renegotiation proceedings on contracts with a Department. He had made a unilateral determination of the amount of excessive profits, and by agreement with complainant, had suspended payment upon public vouchers otherwise payable by the Department to complainant, pending final determination of the suit.

The suit here is not one which would result in requiring the payment of any money by the United States to respondent. It is a suit to prevent petitioners from carrying out their unlawful determinations which threaten to deprive respondent of its legal right to retain the proceeds of its contracts with a foreign government, which contracts have not been subjected to the jurisdiction of petitioners for any purpose. A judgment for respondent herein would not, as suggested by petitioners, have "a substantial impact upon the financial affairs of the sovereign." (Petitioners' brief, p. 61) The sovereign has asserted no claim to the right to renegotiate respondent's charters with the British Ministry. On the contrary, it has through its law-making body specifically rejected the suggestion that such contracts be subjected to the provisions of the Renegotiation Act.

It is only the petitioners herein who have, despite such action by the sovereign, arbitrarily made determinations without any lawful authority, that respondent's charter parties are subject to the provisions of the Renegotiation Act, which, according to its terms, is applicable only to contracts with a Department specified therein.

Those determinations are not the determinations of the sovereign. They are the acts of the individuals.

Furthermore, "The Governments of the United States and the United Kingdom have reached an understanding for the settlement of lend-lease and reciprocal aid, * * * and for the final settlement of the financial claims of each Government against the other arising out of the conduct of the war * * * .

"This settlement for lend-lease and reciprocal aid will be complete and final." (*See Department of State Publication 2439, Commercial Policy Series 80, December, 1945, p. 4*)

The payment of the charter hire to respondent for the account of the British Ministry was made pursuant to an agreement between the two governments under lend-lease arrangements.

The conduct of the petitioners, therefore, can only be characterized as an illegal effort to recover from respondent the obligations of the British Government to the United States, which obligations have been settled by agreement between the two sovereigns.

That there is no basis for petitioners' contention that this is a suit against the United States is obvious from the facts and the cases heretofore cited.

CONCLUSION.

For the reasons stated herein, respondent prays that this Court determine that its charters with the British Ministry are not contracts with a Department within the meaning of the Renegotiation Act, and are not subject to the provisions thereof, and grant the relief sought in the complaint, and that the decree of the Court below be modified accordingly.

Respectfully submitted,

Bon Geaslin,
520 Investment Building,
Washington 5, D. C.
Attorney for Respondent.

January, 1946.

APPENDIX 1.

WAR SHIPPING ADMINISTRATION.

Price Adjustment Board,

New York, N. Y.

Attention of:

In reply refer to LPI-A No.
P. A. Paddock, Room 1002 — Budget Bureau No. 49-R183
39 Broadway, New York — Approval Expires 12/31/44

May 24, 1944

Waterman Steamship Corp.
Mobile, Alabama.

Gentlemen:

Price Adjustment Boards and Sections have been established for the conduct of statutory proceedings for the renegotiation of contracts and subcontracts. Renegotiation with respect to contractors whose fiscal years ended on or before June 30, 1943 is controlled by the Renegotiation Act of 1942 as amended by the retroactive provisions of the Renegotiation Act of 1943. Renegotiation with respect to fiscal years ended after June 30, 1943 is controlled by the Renegotiation Act of 1943. Copies of both Acts are enclosed herewith.

The matter of conducting your statutory renegotiation proceedings has been assigned to this office.

Unless the amount of your business during your latest complete fiscal year was less than the statutory minimum as defined by subsection (c) (6) of the Act applicable to your business for that year, you are required by law to furnish the information called for by the "Standard Form of Contractor's Report." On the basis of the information thus presented, a determination will be made as to whether or not further renegotiation proceedings will be necessary. (Steamship Companies please observe enclosed memorandum and be guided accordingly.)

To assist you in determining whether or not your business exceeded the statutory minimum as defined in the statutes

referred to, your attention is invited to the "Instructions for Preparation of Standard Form of Contractor's Report," which accompany this communicatic .

The enclosed "Standard Form of Contractor's Report" is requested pursuant to the statutory power to obtain information deemed necessary under the Act. Your filing of this "Standard Form of Contractor's Report" in satisfactory form will be deemed a compliance with the statutory provision requiring the filing by contractors and subcontractors of a financial statement under the first sentence of subsection (c) (5) (A) of the 1943 Act, if filed within the time prescribed in such Act.

The "Standard Form of Contractor's Report" is to be filed with the undersigned, in duplicate. If your concern reports on a fiscal year basis for federal income tax purposes, the report prepared should cover the same period.

If all of the information called for by this form has been furnished the Price Adjustment Agency to which the contractor has been assigned, refer to the final paragraph of the instructions.

A separate letter or statement, in duplicate, containing any comments which you believe pertinent with respect to statutory renegotiation as it affects you will be appreciated.

Should you need any information to aid you in the compilation of this material, in addition to that herein enclosed, you may call this office on the telephone. The number is Whitehall 3-8000, Extension 569.

Very truly yours,

/s/ JAMES L. MURPHY,
JAMES L. MURPHY,
Chairman.

Enclosures:

Standard Form of Contractor's Report (3)
Instructions for Preparation of
Standard Form of Contractor's Report
Pamphlet containing Renegotiation Acts
of 1942 and 1943.

APPENDIX 2.

The Shipping Act, 1916, as Amended.

Title 46 U. S. C.

"Sec. 808. *Registration, enrollment, and licensing of vessels purchased, chartered, or leased; regulations; coastwise trade.*

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"Except as provided in section 1181 of this title, it shall be unlawful, without the approval of the United States Maritime Commission, to sell, mortgage, lease, charter, deliver, or in any manner transfer, or agree to sell, mortgage, lease, charter, deliver, or in any manner transfer, to any person not a citizen of the United States, or transfer or place under foreign registry or flag, any vessel or any interest therein owned in whole or in part by a citizen of the United States and documented under the laws of the United States, or the last documentation of which was under the laws of the United States."

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APPENDIX 3.

The Declaratory Judgment Act.

Title 28, U. S. C.

"Sec. 400. Declaratory judgments authorized; procedure

"(1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

"(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

"(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not."

SUPREME COURT OF THE UNITED STATES.

No. 435.—October Term, 1945.

Edward Macauley et al., Petitioners, vs. Waterman Steamship Corporation. On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[March 25, 1946.]

Mr. Justice Black delivered the opinion of the Court.

The Renegotiation Act[1] authorizes the Chairman of the Maritime Commission under certain conditions prescribed by the Act to renegotiate war contracts made with the Commission for purposes of eliminating excessive profits. Respondent Waterman Steamship Corporation brought this suit against the Chairman of the Maritime Commission and the Maritime Commission Price Adjustment Board seeking a declaratory judgment that certain contracts to which it was a party were not subject to the Renegotiation Act and an injunction prohibiting further renegotiation proceedings involving these contracts. The complaint alleged the following facts here relevant: The Maritime Commission Price Adjustment Board notified Waterman that it had been assigned to renegotiate Waterman's contracts with the Commission and to determine the amount of excessive profits, if any, realized by Waterman. Waterman was requested to attend an initial conference and to supply information concerning these contracts which included certain Red Sea charters. Waterman in his reply to the Board denied its authority to renegotiate the Red Sea charters on the ground that these had been made with the British Ministry of War Transport and not with the Maritime Commission. The Price Adjustment Board in its answer to Waterman insisted that while the Red Sea charters were signed by the British Ministry for "technical reasons", they had been negotiated with Waterman by the Maritime Commission on behalf of the United States Government which was now responsible for paying the obligations incurred, and that they were therefore renegotiable

[1] 56 Stat. 226, 245; 56 Stat. 298, 982; 57 Stat. 347; 57 Stat. 569; 58 Stat. 21, 78.

contracts with the Commission.[2] Respondent refused to furnish the information requested and brought this suit in the District Court. That Court relying on *Myers* v. *Bethlehem Steel Corporation*, 303 U. S. 41, dismissed the complaint on the ground that Waterman had failed to exhaust the administrative remedies provided by Congress in the Renegotiation Act. The Court of Appeals reversed. 151 F. 2d 292. We granted certiorari because of the importance of the question involved.

The District Court properly held that this case should be dismissed on the authority of *Myers* v. *Bethlehem Steel Corporation*, 303 U. S. 41. In that case the employer sought to enjoin officials of the National Labor Relations Board from holding hearings on the ground that the business was not covered by the National Labor Relations Act. This Court held that the injunction could not be issued. It pointed out that the exclusive "power to prevent any person from engaging in any unfair practice affecting commerce . . . [had] . . . been vested by Congress in the Board." 303 U. S. at 48, and concluded that to grant the injunction would violate the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Under this rule the District Court here too lacked power to grant an injunction.

Just as in the *Myers* case, the claim here is that the contracts are not covered by the applicable statute. And the applicable statute, the Renegotiation Act, like the National Labor Relations Act in the *Myers* case, empowers administrative bodies to rule on the question of coverage. The Renegotiation Act authorizes the Chairman of the Maritime Commission to conduct investigations

[2] Part of the Price Adjustment Board letter read as follows:

"On April 30, 1941 the President wrote the Chairman of the Maritime Commission and directed him 'as part of the defense effort to which this country is committed' to secure the service of at least 2,000,000 tons of merchant shipping. Pursuant to this direction, the Commission negotiated with the vessel owners. The vessels were made available, a charter party was signed with the British Ministry of War Transport for technical reasons but the commission agreed to pay the vessel owner the agreed compensation for the use of the vessel. This arrangement was evidenced by correspondence between the Commission and the vessel owner.

There appears to have been mutuality of understanding among all the parties interested, legality of consideration and definit'ness [sic] as to terms, time of performance and acceptance. Payment was made in due course as agreed and this payment constitutes a part of the cost of the war to the people of the United States."

in the first instance to determine whether excessive profits had been made on contracts with the Commission. A contractor aggrieved by the Chairman's determination of excessive profits may have them redetermined in a "de novo" proceeding before the Tax Court. Section 403(c)(1) of the Act provides that the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits . . ." Contrary to respondent's contention that this language limits the Tax Court's jurisdiction so as not to include the power to decide questions of coverage, we think the language shows that the Tax Court has such power. For a decision as to what are and are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits. The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law,[3] which latter includes the issue raised here of whether the contracts in question are subject to the Act. In order to grant the injunction sought the District Court would have to decide this issue in the first instance. Whether it ever can do so or not, it cannot now decide questions of coverage when the administrative agencies authorized to do so have not yet made their determination. Here, just as in the *Myers* case, the administrative process, far from being exhausted, had hardly begun. The District Court consequently was correct in holding that it lacked jurisdiction to act.[4]

Respondent urges several grounds for not applying the rule of the *Myers* case here. It points out that wilful failure to comply with the Adjustment Board's request for information would subject it to penalties under the Act; that the Chairman of the Commission and the Tax Court can enforce their orders without court enforcement proceedings; that the Act specifically provides that the Tax Court's determination is not subject to court review; and that even if respondent could, subsequent to a Tax Court de-

[3] One of the sponsors of the Renegotiation Act in the House explained the Bill as providing that the Tax Court could make decisions on all "questions of fact and law . . ." 90 Cong. Rec. 1355.

[4] The same principles which justified dismissal of the cause insofar as it sought injunction justified denial of the prayer for a declaratory judgment. Great Lakes Dredge & Dock Company *v.* Huffman, 319 U. S. 293, 299; Coffman *v.* Breeze Corporations, 323 U. S. 316; Alabama State Federation of Labor *v.* McAdory, — U. S. —; Brillhart *v.* Excess Ins. Co. of America, 316 U. S. 491, 494, 499.

termination, have resort to the courts, it would be subjected to a multiplicity of suits in order to recover the money due on the contracts. Even if one or all of these things might possibly occur in the future, that possibility does not affect the application of the rule requiring exhaustion of administrative remedies. The District Court had no power to determine in this proceeding and at this time issues that might arise because of these future contingencies. Its judgment dismissing the complaint was correct. The judgment of the Circuit Court of Appeals is

Reversed.

Mr. Justice DOUGLAS concurs in the result.

Mr. Justice JACKSON took no part in the consideration or decision of this case.